

***United States Court of Appeals  
for the  
District of Columbia Circuit***



**TRANSCRIPT OF  
RECORD**



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BRIEF FOR APPELLANT

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 22875 and 22910\*  
(Criminal Nos. 1440-67 and 298-66)

Benjamin O. Greenwood, III, Appellant

v.

United States of America, Appellee

APPEALS FROM JUDGMENT OF CONVICTION, REVOCATION OF PROBATION,  
AND SENTENCES OF THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals  
for the District of Columbia Circuit

FILED MAY 7 1970

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April 20, 1970 CLERK

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\*These appeals were consolidated by order of the Acting Chief Judge  
of this Court dated August 20, 1969.

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BRIEF FOR APPELLANT

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*Read Williams - appellate post-W*  
*Adams - no counsel present*



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STATEMENT OF ISSUES PRESENTED FOR REVIEW

A. In Criminal Case No. 1440-67

1. WHETHER the trial court improperly denied the defendant's motion for suppression of his identification from a police lineup because:

(a) there was no probable cause for the arrest of the defendant and his identification from a police lineup following the arrest was the fruit of an illegal detention; and

(b) the police lineup proceedings were conducted during a period of "unnecessary delay" in violation of Rule 5(a), Federal Rules of Criminal Procedure, and Mallory; and

(c) the defendant was denied effective assistance of counsel at the police lineup proceedings, in violation of Wade-Stovall; and

(d) the police lineup proceedings were unnecessarily suggestive," in violation of due process of law.

2. WHETHER in a trial upon an indictment for rape, it was reversible error for the trial court to instruct the jury on the lesser-included offense of assault with intent to commit rape, when the evidence showed either that the defendant had aided and abetted another in the commission of rape or that he was innocent of this offense.

*Evidence on  
one  
victim  
differed.  
Unquestionable  
rape  
done by  
Brown  
who much  
aid for  
A*

3. WHETHER in a trial upon an indictment for rape, the trial court's repeated instructions on the lesser-included offense of assault with intent to commit rape so unbalanced the instructions and so emphasized the possibility of the defendant's

conviction of this lesser offense, as to constitute reversible error.

4. WHETHER in response to a question from the jury reading "Does the aiding and abetting clause apply equally to having carnal knowledge and intent to rape?", the trial court erroneously instructed the jury that "The answer is yes," and whether in the circumstances this instruction was reversible error.

5. WHETHER the defendant was denied a speedy trial in violation of his rights under the Sixth Amendment to the Constitution of the United States.

B. In Criminal Case No. 298-66

6. WHETHER it was harmless error for the trial court to proceed with revocation of probation where defendant was not represented by counsel for the purpose of the revocation hearing.

7. WHETHER, if defendant's conviction in Criminal Case No. 1440-67 is reversed, the trial court's revocation of defendant's probation in Criminal Case No. 298-66 must be vacated, because no basis was stated for such revocation other than the defendant's conviction in Criminal Case No. 1440-67.

PRIOR PROCEEDINGS BEFORE THIS COURT

These cases have previously been before this Court in connection with the following:

1. Appellant's Motion to Remand (for purpose of supplemental proceedings with respect to pretrial identification of the appellant) filed on September 5, 1969, considered and granted on October 21, 1969 before Judges Bazelon, Wright and McGowan, Circuit Judges, in Chambers, Judge Bazelon not participating.

2. Appellant's Motion for Release on Personal Recognizance Pending Appeal, filed on September 5, 1969, considered and denied without prejudice on October 21, 1969 before Judges Bazelon, Wright and McGowan, Circuit Judges, in Chambers, Judge Bazelon not participating.

3. Appellant's Motion for Reconsideration of Motion for Release Pending Appeal, filed on November 26, 1969, considered and deferred by Order entered December 19, 1969, before Judges Wright and McGowan, Circuit Judges, in Chambers.

4. In Criminal Case No. 298-66 (Appeal No. 22910), on further consideration of a pending motion for appointment of counsel, before Judge Bazelon, Chief Judge, and Judge Leventhal, Circuit Judge, in Chambers, this Court entered an order on June 24, 1969 appointing the undersigned to represent the Appellant and directing the undersigned to brief issue no. 6 under "Statement of Issues Presented for Review."

5. Motions for extension of time, filed on July 3, 1969, and March 10, 1970, and Motion to Consolidate Appeals and for extension of time, filed on August 7, 1969.

#### REFERENCES TO RULINGS

In conformity with Rule 8(e) of the General Rules of this Court, appellant makes reference to the following rulings of the trial court:

1. Rulings denying appellant's oral motions to dismiss indictment for lack of speedy trial (Tr. 9, 162).
2. Ruling denying appellant's oral motion to dismiss and for judgment (on the ground the Government failed to prove that Greenwood aided and abetted Brown) (Tr. 162).
3. Rulings of the trial court with respect to the defendant's objections to the trial court's instructions and with respect to the defendant's motion for mistrial (Tr. 210-231).
4. Judgment and Commitment filed on March 5, 1969 in Criminal Case No. 1440-67, adjudging the defendant upon his plea of not guilty and a jury verdict of guilty, convicted of two counts of assault with intent to commit rape and two counts of assault with a dangerous

weapon, and sentencing the defendant to a period of from four to twelve years, said sentence to run consecutively with the sentence imposed in Criminal Case No. 298-66.

5. Judgment and Commitment filed on March 5, 1969 in Criminal Case No. 298-66, revoking appellant's probation and sentencing appellant to a term of from one to three years.
6. Transcript of sentencing proceedings on February 28, 1969, filed in Criminal Case No. 1440-67 on April 30, 1969.
7. Ruling of the trial court on remand, denying appellant's motion for suppression of his identification (Tr. Rem. 171-173).
8. Order filed on the        day of February, 1969 in Criminal Case No. 1440-67, denying defendant's motion to suppress his identification. (See Addendum p. A-26.)

#### STATEMENT OF CASE

##### A. Nature of the Case

Appellant Benjamin O. Greenwood, III appeals from a Judgment and Commitment signed on February 28, 1969 by United States District Judge June L. Green and filed in the United States District Court for the District of Columbia in Criminal Case No. 1440-67 on March 5, 1969, adjudging the appellant, upon a plea of not guilty and a jury verdict of guilty returned on January 14, 1969, convicted of the following offenses:

Assault With Intent to Commit Rape under  
Count One (22 D.C. Code §501);

Assault With a Dangerous Weapon as charged  
in Count Two (22 D.C. Code §502);

Assault With Intent to Commit Rape under  
Count Three (22 D.C. Code §501);



Assault With a Dangerous Weapon as charged  
in Count Four (22 D.C. Code §502);

and committing the defendant to the custody of the Attorney General for imprisonment for a period of four (4) years to twelve (12) years; said sentence to run consecutively with a sentence of from one (1) to three (3) years imposed in connection with the revocation of appellant's probation in Criminal Case No. 298-66.

Appellant Greenwood further appeals from a Judgment and Commitment signed on February 28, 1969 by United States District Judge June L. Green and filed in the United States District Court for the District of Columbia in Criminal Case No. 298-66 on March 5, 1969, revoking appellant's probation (on the ground of his conviction in Criminal Case No. 1440-67) and committing the appellant to the custody of the Attorney General for imprisonment for a period of from one (1) to three (3) years.\*

These appeals were consolidated by order of the Acting Chief Judge dated August 20, 1969.

B. Course of Proceedings

1. Arrest; arraignment; proceedings before trial.

Greenwood was arrested without a warrant at about 8:45 p.m. on Tuesday, September 12, 1967 near Kramer Junior High School, 17th and Q Streets, S.E., in Washington, D. C., along with

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\*Appellant was adjudged convicted upon a plea of guilty entered on April 27, 1967 before United States District Judge Oliver Gasch, of the offense of Unauthorized Use of Vehicle (22 D.C. Code §2204). Imposition of sentence was suspended and appellant was placed on five years' probation on June 30, 1967 (Judgment and Probation filed in Criminal Case No. 298-66 on July 5, 1967). Appellant does not appeal from this judgment.

one Leon Blagmon and one William Brown.<sup>1</sup> Greenwood's arrest occurred at about the same time that three separate offenses were reported as having occurred in or near the school grounds, each unrelated to the offenses of which Greenwood was convicted and from which he is appealing.<sup>2</sup> Greenwood was taken down to the 11th Police Precinct following his arrest and "booked" on a charge of Assault With a Dangerous Weapon, upon the complaint of Harry S. Shaw.

Greenwood, Blagmon and Brown were detained at the 11th Police Precinct during the night of September 12, 1967. The following morning, on September 13, 1967, commencing at about 9:30 a.m., and before presentment to a magistrate, they were made to appear in a police lineup at Police Headquarters, 300 Indiana Avenue, N.W., at which time they were viewed by eleven witnesses to open crimes not related to the offenses for which they had been arrested. The lineup proceedings were concluded at about 10:45 a.m.

Greenwood and Brown were identified at this police lineup by Mrs. Louise Smith (identification initially uncertain) and by her daughter Linda Smith, in connection with a rape that had occurred some five (5) weeks previously, on August 7, 1967.

Following the police lineup proceedings, Greenwood and Brown were charged with rape upon the complaints of Louise

<sup>1</sup>See "Appellant's Arrest on September 12, 1967," infra, for detailed statement of circumstances of appellant's arrest.

<sup>2</sup>The offenses reported were ADW (Gun) upon the complaint of Harry S. Shaw; Robbery (PBS) upon the complaint of Regina Harvey; and Assault With Intent to Rape upon the complaints of Geraldine Gaines and Yvette Belt. See "Appellant's Arrest on September 12, 1967," infra.

Smith and Linda Smith. Greenwood and Brown were thereafter taken to the District of Columbia Court of General Sessions for presentment on this charge. The charge previously placed against Greenwood (ADW upon the complaint of Harry Shaw) and the charges previously placed against Brown (Robbery upon the complaint of Regina Harvey and Assault With Intent to Commit Rape upon the complaints of Geraldine Gaines and Yvette Belt) were "No-Papered".

Greenwood and Brown were "arraigned" before Judge Fred L. McIntyre during the afternoon of September 13, 1967; were ordered held without bond; and the preliminary hearing was continued to September 19, 1967. At the preliminary hearing on September 19, 1967, the Court (Judge Thomas E. Scalley) found sufficient evidence to hold the defendants for action of the Grand Jury. Bond was again denied.

On November 15, 1967 the Grand Jury returned an indictment charging Greenwood and Brown with two counts of Rape (22 D.C. Code §2801) and two counts of Assault With a Dangerous Weapon (22 D.C. Code §502), upon Louise Smith and Linda Smith, said offenses occurring on or about August 7, 1967 within the District of Columbia. The case was assigned Criminal Case No. 1440-67.

Greenwood and Brown were arraigned on these charges in the United States District Court on December 1, 1967 before Judge Leonard P. Walsh, at which time each entered a plea of not guilty to the counts of the indictment.

Greenwood filed a first motion for release on personal recognizance on February 16, 1968, which motion was heard

and denied by United States District Judge Joseph C. Waddy on March 8, 1968. Greenwood filed a second motion for release on personal recognizance on August 1, 1968, which motion was heard and granted on August 16, 1968 by United States District Judge Howard F. Corcoran, Greenwood having by that time spent more than 11 months in jail.

On August 5, 1968, counsel for Brown filed a motion for severance and separate trial on the ground that "an extensive report had been submitted by Saint Elizabeth's Hospital on Brown's mental competency, and Brown was unable to make necessary decisions relative to said report because of Greenwood's possible presence at trial." The motion was granted with the consent of the Government on September 13, 1968, by United States District Judge Oliver Gasch. On October 7, 1968, Brown was brought to trial before Judge Gasch on the charges in the indictment [and on charges in two other cases (Nos. 1441-67 and 1443-67) consolidated for trial as to Brown only with Criminal Case No. 1440-67] and found not guilty by reason of insanity (see Findings of Fact and Order at page A - 23 in the Addendum to this Brief).

On August 29, 1968, Greenwood filed a motion to dismiss for lack of speedy trial under Rule 48(b), Federal Rules of Criminal Procedure, contending that a delay of approximately one year from the time of arrest to the time of trial, during which he spent approximately 11 months in jail, abridged his Sixth Amendment



rights to a speedy trial. The motion was heard, argued, and denied by Judge Gasch on September 13, 1968.

Criminal Case No. 1440-67 was first set for trial on September 9, 1968 (date certain). It was subsequently continued and reset on September 23, 1968, then on October 24, 1968, then on November 6, 1968, then on November 25, 1968 and then on January 6, 1969 (all dates certain). The case was called for trial on January 10, 1969, approximately 16 months after the date of arrest.

The Docket in Criminal No. 1440-67 reflects that continuances were sought by the Government and granted on September 20, 1968 and on December 17, 1968. Counsel for the defendant sought one continuance on or about September 5, 1968. Counsel for the Government admitted at trial to requesting at least two additional continuances (not reflected on the docket) (Tr. 7).

2. Proceedings with respect to offenses reported on September 12, 1967.

Although not strictly involved in these appeals, appellant has included in the Addendum to this Brief a brief statement of the course of proceedings with respect to the three offenses that were reported as having occurred in or near Kramer Junior High School at about the time of Greenwood's arrest during the early evening of September 12, 1967 (see p. A - 21 ). These three other offenses were referred to in detail at the hearing on remand held in this case on January 16 and 19, 1970 (see transcript

on remand) and the proceedings in respect thereto are considered relevant to Greenwood's contention that there was no probable cause for his arrest, and accordingly that his identification by the complaining witnesses in this case from a police lineup should have been suppressed as the fruit of an illegal detention (see Argument I., infra).

3. Proceedings in Criminal Case No. 298-66.

On March 14, 1966, Leon Blagmon and Greenwood were indicted by the Grand Jury on charges of Unauthorized Use of Vehicle (22 D.C. Code §2204) (upon the complaint of one Canis O. Gardner) and Robbery (22 D.C. Code §2901) (upon the complaint of one Delores O. Montgomery), said offenses allegedly occurring on or about December 23, 1965 within the District of Columbia. The case was assigned Criminal Case No. 298-66. Blagmon and Greenwood were arraigned on these charges in the United States District Court on March 25, 1966, at which time each entered a plea of not guilty to the indictment.

On May 20, 1966, United States District Judge William B. Bryant granted the Government's oral motion for dismissal of the indictment as to Blagmon.

Criminal Case No. 298-66 was called for trial before United States District Judge Oliver Gasch on April 27, 1967, at which time Greenwood's plea of Not Guilty to Count One (Unauthorized Use of Vehicle) was withdrawn and a plea of Guilty to Count One entered. On June 30, 1967, Greenwood was adjudged convicted of

Unauthorized Use of Vehicle upon his plea of guilty. Count Two of the indictment was dismissed by agreement. The Court, per Judge Oliver Gasch, suspended the imposition of sentence and ordered Greenwood to be placed on probation for a period of five (5) years.

On or about January 29, 1969, Greenwood was apprised by his Probation Officer, John R. Fersinger, that he had violated the conditions of his probation in that on January 14, 1969 he had been found guilty in Criminal Case No. 1440-67 of Assault With Intent to Commit Rape (two counts) and of Assault With a Dangerous Weapon (two counts). He was further apprised that he would be given an early hearing before the Court on the violation of his probation (see "Statement of Violation of Probation," p. A - 25 ).

On February 28, 1969, at the time of sentencing in Criminal Case No. 1440-67, United States District Judge June L. Green signed a Judgment and Commitment revoking appellant's probation and sentencing appellant to a term of from one (1) to three (3) years.

Notice of appeal from the revocation action of the District Court was filed on February 28, 1969. An order allowing preparation of the transcript of proceedings at the Government's expense and referring the appointment of counsel on appeal to this Court was filed on March 13, 1969.

On April 23, 1969, Dorsey Evans, Esq. was appointed by this Court for the specific purpose of informing this Court of

any non-frivolous issues that might be alleged in connection with his appeal from the revocation of his probation. Subsequently, a brief was filed by Mr. Evans suggesting no non-frivolous issues, other than reversal of Greenwood's conviction in Criminal Case No. 1440-67 (which reversal would require reversal of the revocation action as well, since no basis other than the conviction was stated for the revocation action). Subsequently, upon further consideration of the pending motion for appointment of counsel, this Court entered an Order on June 24, 1969 appointing the undersigned to represent the appellant and specifically directing the undersigned to brief the issue "whether it was harmless error for the District Court to proceed with revocation of probation where appellant was not represented by counsel for the purpose of the revocation hearing." (Issue No. 6 under "Statement of Issues Presented for Review.")

#### 4. Trial Proceedings and Sentencing.

Criminal Case No. 1440-67 was called for trial before United States District Judge June L. Green on Friday, January 10, 1969. Prior to the voir dire, Greenwood renewed his motion to dismiss for lack of speedy trial. The motion was heard, argued, and denied, the Court ruling that "the only time that this motion would be granted is in the event his possibilities of defense had been prejudiced in any way and the Court does not see any evidence of that and therefore, would overrule this motion" (Tr. 9). The

jurors were sworn, trial was commenced, and respited at 4:06 p.m. until Monday, January 13, 1969.

Trial was resumed on January 13, 1969, the testimony of witnesses was received and concluded, instructions were given, deliberations of the jury commenced, the jury returned to the courtroom, and the foreman announced "the jury has agreed upon a verdict." A verdict of "not guilty" was then returned to Count One of the indictment (charging rape). When the Clerk called for the jury's verdict on the lesser-included offense of assault with intent to commit rape under Count One, the foreman stated "I don't understand you. Is that Count Two?" At this time, it appearing that the jury had failed to understand the Court's instructions, the Court refused to permit the jury to state its verdict on the remaining counts of the indictment; the Court re-instructed the jury with regard to the lesser-included offense under Counts One and Three; the jury was returned to the jury room to resume deliberations; and the jury was thereafter excused, to resume deliberations on January 14, 1969.

The jury resumed deliberations on January 14, 1969, following additional instructions given in response to several questions requesting clarification of the instructions. Thereafter the following verdict was returned:

Not guilty on Count One (Rape).

Guilty on the lesser-included offense of Assault With Intent to Commit Rape under Count One.



Guilty on Count Two (Assault With a Dangerous Weapon).

Not guilty on Count Three (Rape).

Guilty on the lesser-included offense of Assault With Intent to Commit Rape under Count Three.

Guilty on Count Four (Assault With a Dangerous Weapon).

Greenwood was sentenced in proceedings before Judge Green on February 28, 1969. The Court at this time adjudged the defendant convicted of two counts of Assault With Intent to Commit Rape and two counts of Assault With a Dangerous Weapon, and sentenced Greenwood to imprisonment for a term of from four (4) to twelve (12) years, said sentence to run consecutively with the sentence imposed in Criminal Case No. 298-66 (see "Proceedings in Criminal Case No. 298-66," supra). *on which counts*

5. Proceedings after Trial and Sentencing.

Greenwood filed Notices of Appeal on February 28, 1969 in Criminal Case No. 1440-67 and in Criminal Case No. 298-66. An Order was entered on March 4, 1969 in Criminal Case No. 1440-67, per United States District Judge Green, directing preparation of the transcript of proceedings at Government expense and referring the appointment of counsel on appeal to the United States Court of Appeals. A similar order was entered on March 13, 1969 in Criminal Case No. 298-66.

On August 7, 1969 appellant filed in the District

Court motions for bail pending appeal and for production of the pre-sentence report. Both motions were heard, argued, and denied by Judge Green from the bench on August 29, 1969.

On August 7, 1969 the appellant filed in this Court a motion to consolidate the appeals in Criminal Case No. 1440-67 and No. 298-66. Said motion was granted by order of the Acting Chief Judge dated August 20, 1969.

On September 5, 1969 the appellant filed in this Court a motion for bail pending appeal and a motion to remand for supplemental proceedings (with respect to the pretrial identification of the appellant). This Court by Order entered October 21, 1969 granted appellant's motion to remand, and denied appellant's motion for release on bail, "without prejudice to the filing in the District Court of a motion for reconsideration in light of the remand proceedings."

Pursuant to this Court's Order of October 21, 1969, appellant filed on November 4, 1969 in the District Court, a motion for reconsideration of his motion for bail pending appeal. Said motion was heard, argued, and denied by United States District Judge Green on November 21, 1969.

On November 26, 1969, following Judge Green's denial of his motion for reconsideration, appellant filed in this Court a motion for reconsideration of his motion for release on bail pending appeal. Said motion for reconsideration was deferred, and

by Order of this Court entered December 19, 1969, it was directed that the scheduling of these appeals for oral argument be expedited and that appellant's request for release on bail "be referred to the merits division for its consideration." This Court has not ruled with respect to appellant's request as of the time of filing of appellant's brief.

6. Proceedings on remand.

Pursuant to appellant's motion to remand for supplemental proceedings, granted by this Court on October 21, 1969, hearings were held in the United States District Court before United States District Judge June L. Green (the trial judge) on January 16 and 19, 1970. At these hearings the District Court received testimony from the complaining witnesses, Mrs. Louise Smith and her daughter Linda Smith (now Linda L. Higgins); from Jon Feldman, Esq. (an attorney then with the District of Columbia Legal Aid Agency present at the police lineup in which Greenwood was identified); two of the police officers involved in Greenwood's arrest; one Harry S. Shaw (a complaining witness in one of the offenses of September 12, 1967); and Detective William R. Holden (the police detective who conducted the police lineup). Following the testimony of these witnesses, the Court heard oral argument with regard to the defendant's oral motion for suppression of his identification. The Court denied the defendant's said motion on January 19, 1970 from the bench, finding that there was

probable cause for the arrest of Greenwood, finding that Greenwood was represented by counsel at the lineup, finding that the lineup was not otherwise suggestive or improper, and finding that Mallory was not applicable to the lineup because an attorney was present. Judge Green subsequently (on February , 1970) filed an Order in writing consistent with her previous ruling from the bench, denying Greenwood's motion for suppression of his identification (see p. A - 26 ).

C. Disposition in the Court Below.

1. At Trial.

On February 28, 1969 before United States District Judge June L. Green, in Criminal Case No. 1440-67, appellant was adjudged, upon a plea of not guilty and a jury verdict of guilty, convicted of two counts of Assault With Intent to Commit Rape (22 D.C. Code §501) and two counts of Assault With a Dangerous Weapon (22 D.C. Code §502), and was sentenced by Judge Green to imprisonment for a period of from four (4) to twelve (12) years, said sentence to run consecutively with a sentence of from one (1) to three (3) years imposed by Judge Green in Criminal Case No. 298-66, pursuant to the revocation of appellant's probation in that case (upon the ground of appellant's conviction in Criminal Case No. 1440-67), Greenwood having been adjudged previously, upon a plea of guilty, convicted of the offense of Unauthorized Use of Vehicle and sentenced on June 30, 1967 to a period of five years' probation.

## 2. On Remand.

These appeals were ordered remanded to the District Court by Order of this Court entered October 21, 1969, for supplemental proceedings with respect to the pretrial identification of the appellant at the police lineup on September 13, 1967. Pursuant to the remand order of this Court, hearings were held in the United States District Court before United States District Judge June L. Green on January 16 and 19, 1970, followed by oral argument on January 19, 1970 on Greenwood's motion for suppression of his identification, upon the grounds that his identification was the product of an illegal detention, and was otherwise improperly obtained in violation of Wade-Stovall and due process of law. The Court denied from the bench Greenwood's motion for suppression of his identification, finding that there was probable cause for his arrest, that his identification did not occur during a period of illegal detention, and that the proceedings at which he was identified were otherwise proper. The Court thereafter filed an Order, consistent with its ruling from the bench, on February , 1970 (see p. A - 26 in the Addendum to this Brief).

### D. Statement of Facts\*

#### 1. Appellant's arrest on September 12, 1967.

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\*There are two transcripts of proceedings. References to the transcript of proceedings at the trial on January 10, 13 and 14, 1969 will be indicated by the abbreviation "Tr." followed by the page number. References to the transcript of proceedings on remand (January 16 and 19, 1970) will be indicated by the abbreviation "Tr. Rem." followed by the page number.



[The testimony concerning Greenwood's arrest may be found in the transcript on remand at pp. 99-127 and at pp. 147-149. For clarification there is reproduced in the Addendum to this Brief, police records referred to in the testimony on remand (including offense reports, statements of complaining witnesses, statement of the arresting officer), an annotated map of the Kramer Junior High School area, and other materials listed in the index to the Addendum.]

Greenwood was arrested without a warrant at about 8:45 p.m. on September 12, 1967 on the west side of Kramer Junior High School, 17th and Q Streets, S.E., Washington, D. C., by Officer Carnwell C. Dean (Tr. Rem. 100, 115, 116) (see annotated map in the Addendum to this Brief, p. A - 31-32). It appears from the testimony that Greenwood was first seen running through the playground or recreation area in the rear of the school by Officers Boyd B. Bryant (in a detective cruiser heading south on 18th Street, S.E.) (Tr. Rem. 100, 107) and Carnwell C. Dean (on a motor scooter) (Tr. Rem. 109). According to their testimony, both Officers Bryant and Dean were responding independently to a radio run for Robbery (PBS) at 18th and Q Streets, S.E., and had just at that moment reached the east side of the school (Tr. Rem. 100, 109). Officer Bryant also testified that in approaching the school, he had been stopped by an unidentified cab driver who had informed Bryant "the man just jumped the fence" (Tr. Rem. 100, 109).

At this point, and apparently without any information other than the report of a purse snatching at 18th and Q Streets, S.E., and the report of the unidentified cab driver, Officer Bryant directed Officer Dean to go around the front of the school and over

to the other (west) side. Officer Dean did so, and apprehended Greenwood coming over the west fence (Tr. Rem. 100, 109, 116). He placed Greenwood under arrest (Tr. Rem. 116). In response to the question "Would you tell us what, if anything, you saw him do before you arrested him?", Officer Dean testified "I seen [sic] him do nothing before I arrested him" (Tr. Rem. 116), and further testified that he was acting on information from Detective Bryant (Tr. Rem. 116). On cross examination (Tr. Rem. 117, 118) it was clearly established that Officer Dean was responding to a radio run for Robbery (as was Detective Bryant); that he had no description of any suspect (Tr. Rem. 117); and that Detective Bryant's instructions to Officer Dean to proceed to the other (west) side of the school was based solely upon (1) the report of an unidentified cab driver "that a man had jumped the fence"; (2) their having seen a man run through the playground; and (3) the radio run for Robbery that had brought both officers to the school area.

Officer Bryant testified that Greenwood, Blagmon and Brown were brought around to the front of the school after each had been arrested, and that they were placed in police cruisers and a patrol wagon (Tr. Rem. 101, 147, 148).

Officer Bryant testified that he later interviewed Regina Harvey (the victim of the pocketbook snatching); that Miss Harvey was brought around to the police cruisers in which Greenwood, Blagmon and Brown had been placed; that she identified William

Brown as having snatched her pocketbook; and that she could not identify Greenwood (Tr. Rem. 101, 110)\* [Subsequently an indictment for this offense was returned against Brown only.]

Officer Bryant further testified that after Greenwood had been brought around to the front of the school (at about the same time that Regina Harvey failed to identify Greenwood), Greenwood was identified (in a show-up) by a janitor, Harry Sonny Shaw, as having assaulted Shaw with a gun about 10 minutes previously (Tr. Rem. 101, 102, 148).

Officer Bryant further testified that Greenwood was also identified at about that time (in front of the school, after Greenwood's arrest) by two young girls, Geraldine Gaines and Yvette Belt, as having been with Brown and Blagmon before Brown and Blagmon had taken them into the playground; as having entered the playground subsequently and having stated "here comes the police, here comes the police." (Tr. Rem. 102, 110); as having assaulted the janitor, Mr. Shaw, in front of the school with a gun; and as having been seen "jostling" with a young lady at the corner of 18th & Q Streets, S.E. (Tr. Rem. 103, 110).

Harry Shaw testified that on the night of September 12, 1967 he was out in front of the Kramer School; that two young men [later identified as Blagmon and Brown] had threatened him with pistols, and that a third man (identified by Shaw as Greenwood)

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\*Officer Bryant testified on the second day of the hearing on remand that Regina Harvey could identify Greenwood. This is in conflict with all other evidence in this regard, including police records. See Tr. Rem. 101, 110, 150. See also P.D. Form 111, at page A - 13.

had "tried to break up the fight" (Tr. Rem. 123). In response to the question "It's your recollection this man tried to prevent the other two men from harming you?" Shaw answered "He did, he really did." (Tr. Rem. 123). In response to the question: "Did you have any reason to believe that Greenwood had done anything wrong?", Shaw answered "No I haven't. I think he actually might have saved my life." (Tr. Rem. 126).\*

With regard to what Shaw told the police, Shaw testified as follows:

Q. "What happened after this man broke up the fight that you were involved in with the other two men?"

A. "I went back in the building and about five or ten minutes later a little boy across the street hollered down in the basement to us and told me to come out of the building, that the police was out there. So when I went out in about two seconds they brought him back and put his hands up on the car and asked me was he one of them and I said, Yes, he was, and the next minute they had these other two and I say, 'These are the two that drew the guns on me.' The tall skinny fellow [identified as Brown] and the little short fellow [identified as Blagmon] are the ones that drew the gun on me."

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\*Shaw's statement is consistent with the statement of Geraldine E. Gaines, signed by her at 11:30 a.m. on September 13, 1967 (reproduced in the Addendum to this Brief at p. A-9). In relevant part Miss Gaines' statement is as follows: "The shorter one who was wearing a light jacket and dark pants, white tennis shoes (identified as Greenwood) told him to come on and go." (emphasis supplied). Miss Gaines' written statement, of course, is also inconsistent with Officer Bryant's testimony that Geraldine Gaines and Yvette Belt had identified Greenwood as having assaulted janitor Shaw; Officer Bryant's testimony appears to appellant to be extremely unreliable, not only because it conflicts as to this issue with the weight of the evidence, but also in light of his "turnaround" with regard to the question whether Regina Harvey identified Greenwood in front of the school (see footnote at p. 21).



- Q. "Did you tell the police then that he had broken up the fight?"
- A. "Well, they didn't give me time to tell them nothing. All they asked me when I got to the precinct did I recognize the three. I recognized the three. But that was all. I haven't heard no more from it since."  
(Tr. Rem. 124, 125)

Greenwood was charged, following his arrest, only with Assault With a Dangerous Weapon upon the alleged complaint of Harry Shaw. As more fully set forth elsewhere herein, the charges were "No-Papered" the next morning, and no indictment or other proceedings followed in respect to Greenwood based upon Harry Shaw's complaint.\*

## 2. The Lineup

### (a) Testimony of the Complaining Witnesses.

Greenwood was first identified by the complaining witnesses in this case, Mrs. Louise Smith and Linda Smith, at a police lineup held commencing at about 9:30 a.m. on Wednesday, September 13, 1967\*\* in the roll call room at Police Headquarters,

\*In response to the question why the assaults on the janitor and on Geraldine Gaines and Yvette Belt were "No-Papered", and the assaults on Mrs. Smith and Linda were "Papered", Officer Bryant testified (Tr. Rem. 104) that it was because Mrs. Smith and Linda were present and the Assistant U. S. Attorney could interview the witnesses, and the young girls Yvette Belt and Geraldine Gaines "were not with us at the time ..." (Tr. 104). However, it is a matter of record that the young girls Yvette Belt and Geraldine Gaines were at police headquarters on September 13, 1967, at which time they signed written statements concerning the assault, Geraldine Gaines at 11:30 a.m. in the morning; Yvette Belt at 3:00 p.m. in the afternoon. Copies of same are reproduced in the Addendum to this Brief.

\*\*Counsel for the Government offered during the trial to stipulate that the lineup was held "on the night of September 12 into the 13th of 1967" (Tr. 91) and Government counsel refers to such stipulation at least three times in the course of the trial (Tr. 91, 114, 131). Greenwood's counsel was apparently proceeding on the assumption that the stipulation was in fact true. The stipulation notwithstanding, Detective Holden testified that Mrs. Smith was brought in to view the lineup at 10:00 a.m. on the 13th (Tr. 131) and that Linda Smith viewed the lineup at 10:10 a.m. on that date (Tr. 132). The testimony on remand, and the available police records, clearly establish that the lineup was in fact conducted the following morning, on September 13, 1967.

300 Indiana Avenue, N.W., Washington, D. C., in connection with a rape that had occurred some five weeks previously, on August 7, 1967.

Mrs. Louise Smith testified at trial, with regard to the lineup, that at first she recognized both Brown and Greenwood (Tr. 56); that in response to the question "Are you sure?" (put to her by a detective or lawyer), she stated that she was "sure of one" (Brown) but not sure "about the other one" (Greenwood) (Tr. 56, 57); and that when she looked again, she was sure also about Greenwood:

"I took another look at him and I watched Greenwood's reaction and I also had told the police that he had his fingers bandaged [at the time of the alleged offense on August 7, 1967] and he still had the bandages on his fingers [on September 13, 1967] so then I told him [Detective Holden] that it was him." (Tr. 57).

Mrs. Smith's identification of Greenwood at the lineup was based upon Greenwood's demeanor at the lineup (his "reaction"; "the way he was acting"), and the bandages on his fingers. See Tr. 57, 58, 77, 78, 79 and 80 and Tr. Rem. 22, 28 and 35.\*

When shown a photograph of the lineup at trial (Government's Exhibit No. 1), Mrs. Smith was able to select Brown from the photograph but was unable to identify Greenwood: "I am sure of Brown but I don't know for sure of the other one or not." (Tr. 91).

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\*Excerpts from Mrs. Smith's lineup identification testimony at trial and on remand, with the regard to the basis of her identification, are reproduced at pp. A - 28 , et seq. in the Addendum.

Linda Smith testified at trial that she selected both Greenwood and Brown from the lineup and that she was certain of her identifications (Tr. 114). The basis of her identification of Greenwood was that she "remembered his face" (Tr. 119), and that she noticed the two bandages were still on Greenwood's fingers:

Q. "On what basis did you identify Mr. Greenwood in that lineup?" (Tr. Rem. 52)

A. "Well, I recognized him because I have seen him before and I knew him from his face when he came up to me and my mother on the night of the rape and I noticed that his hand -- he had two fingers -- two bandages was still on his right fingers." (Tr. Rem. 52)

On remand, Mrs. Smith testified that she entered the roll call room at the same time as Linda (Tr. Rem. 21); that she sat on the right side of the room with a detective (Tr. Rem. 21); that Linda sat on the left side of the room, also with a detective (Tr. Rem. 21); that after her identification, she returned to her (original) seat with the detective (Tr. Rem. 23, 37); that her daughter was then called up to make her identification (Tr. Rem. 23); and that her daughter Linda also returned to the same seat (Tr. Rem. 37).

On remand, Mrs. Smith further testified that she had thought that Linda had made an identification first, until on the date of remand, she (Mrs. Smith) "found out" that she (Mrs. Smith) had gone first (Tr. Rem. 23, 24).\*

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\*This testimony suggests to the appellant that Mrs. Smith may have been "schooled" concerning her testimony on the date of the remand hearing.

On remand, Mrs. Smith further testified that she had discussed with her daughter, prior to the lineup on September 13, 1967, what Greenwood and Brown looked like (Tr. Rem. 29, 30, 31); that Linda had not told her, until after the lineup, that she (Linda) had seen Greenwood and Brown before the offense (Tr. Rem. 30); and that in their discussions they (Mrs. Smith and her daughter) had not come to an agreement about what Greenwood looked like (Tr. Rem. 31).

Linda Smith (Linda Higgins at the time of remand) testified on remand that she entered the lineup room with her mother (Tr. Rem. 49); that she went to the right side of the room with a detective (Tr. Rem. 49); and that her mother went to the left side of the room, also with a detective (Tr. Rem. 49);\* and that after she and her mother had made their identifications, they returned to their original seats (Tr. Rem. 59).

Linda Smith flatly and unequivocally denied discussing Greenwood's and Brown's descriptions with her mother prior to the lineup (Tr. Rem. 62, 63).

(b) Testimony of Jon Feldman\*\*

Present at the lineup was one Jon Feldman, at the time a staff attorney with the District of Columbia Legal Aid

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\*As indicated, the recollection of Mrs. Louise Smith is that she was on the right; her daughter on the left.

\*\*The testimony of Jon Feldman may be found at pages 68-96 of the transcript on remand.



Agency (Tr. Rem. 68). Mr. Feldman testified that the Agency had received a telephone call requesting an attorney to be present at a lineup proceeding; and that he attended the proceeding in response thereto (Tr. Rem. 69). Mr. Feldman testified that "there were four young men sitting there," and that "I was told and I was under the impression they were all charged with rape." (Tr. Rem. 71). Feldman further testified he had represented one of the accused (Thomas Fields) on a previous case (Tr. Rem. 72); that he had very little opportunity to consult with Blagmon, Brown, and Greenwood (Tr. Rem. 72, 90); and that he didn't consider he represented any of the accused individually, but that his presence was required to see that the lineup was objectively fair (Tr. Rem. 90).\*

Prior to the proceedings, Attorney Feldman objected to the holding of the lineup on the ground that there was no United States Attorney present, and on the ground that the accused had been arrested the previous evening and had not yet been brought before a (committing) magistrate (Tr. Rem. 71, 72, 89).

Mr. Feldman further testified he was told before the lineup "that these young men were going in front of a lineup involving women or witnesses not connected with the charge

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\*earlier Feldman had testified as follows:

Q. "What did you regard your capacity to be when you came to the lineup."

A. "To observe the lineup and make sure it was a just and a fair lineup, I suppose, from outward appearance." (Tr. Rem. 69)

for which they were arrested for." (Tr. Rem. 73)\*

Attorney Feldman further testified that he never spoke to any of the witnesses who would be viewing the lineup (Tr. Rem. 72, 89); that he did not know who they were prior to the lineup (Tr. Rem. 89, 91); that he did not know in connection with what kind of crime the witnesses would be viewing the lineup (Tr. Rem. 89); and that he was furnished no prior descriptions of the accused by any of the witnesses that would be viewing the lineup (Tr. Rem. 89, 92).

Mr. Feldman further testified he did not know anything about the offense in connection with which Greenwood was identified by Mrs. Louise Smith and Linda Smith (Tr. Rem. 93).

Finally, Mr. Feldman testified at length that it was his recollection that Mrs. Louise Smith and Linda Smith entered the roll call room (in which the lineup was held) together (Tr. Rem. 75); that they identified Brown and Greenwood one in the presence of the other (Tr. Rem. 77, 78); that Mrs. Smith and Linda "looked at each other and possibly talked to each other" (at the time of their first identifications) (Tr. Rem. 78); that their answers (with regard to the identifications of Brown and Greenwood) "were simultaneous" (Tr. Rem. 80); and that after the

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\*His testimony on this point continues as follows: "In other words, they were unsolved robbery or rape charges and they were putting Fields, Blagmon, Brown and Greenwood in a lineup to be viewed by these people and not by anyone who was connected with the offenses for which they were arrested on the previous evening." (Tr. Rem. 73)

first lineup (in which Mrs. Smith was uncertain of her identification of Greenwood) and before the second lineup (in which Mrs. Smith positively identified Greenwood), Mrs. Smith and Linda Smith were seen talking together in the back of the roll call room (Tr. Rem. 82, 95). \*

Mr. Feldman testified from notes made contemporaneously with the lineup proceeding or immediately thereafter. Mr. Feldman's notes were received in evidence at the hearing on remand as defendant's exhibits nos. 1 and 2, and were read by the Court (Tr. Rem. 170, 171).

(c) Testimony of Detectives Holden and Bryant.

Detective Holden testified at trial that he conducted a lineup "in the Detective Bureau Squad Room" (Tr. 131); that the mother and daughter looked at them at different times" (Tr. 131); that Mrs. Smith (the mother) viewed the lineup at ten a.m." (Tr. 131); that he instructed Mrs. Smith that "if she did see the men to walk up and point them out to me." (Tr. 131); that Mrs. Smith picked Greenwood and Brown (Tr. 132); that Linda Smith was not present on this occasion (Tr. 132); that Linda Smith viewed the lineup at 10:10 a.m. (Tr. 132); that Linda Smith was given "the same instructions" as her mother (Tr. 132); and that she also picked Brown and Greenwood (Tr. 132).

On cross examination (at trial), Detective Holden testified that "we conducted this [the lineup] separately" (Tr. 134); that mother and daughter "had no opportunity to talk" (Tr. 134); and

\*See page 29(a).

\*There were in effect two lineup proceedings: one in the roll call room, viewed by all witnesses; a second immediately following the first, in a small room behind the roll call room (at which pictures were taken). Only the witnesses that made identification in the first lineup viewed the second lineup. See the notes of Attorney Jon Feldman (defendant's exhibits 1 and 2). Although not briefed, appellant also questions the right of the police to continue his detention, without presentment, beyond the time of his identification in the first lineup.

that when the mother was outside the room [after having identified Greenwood and Brown], "the daughter was in the room" (Tr. 134, 135).\*

On remand, Detective Holden testified that he "did not recall" where the daughter was when the mother made her identification (Tr. Rem. 131, 132), and that to the best of his knowledge, "Linda Smith did not come into the room at the same time" (as her mother) (Tr. Rem. 132).

Detective Holden further testified (on remand) that after Mrs. Smith viewed the lineup, he "told her to sit in the back of the room or go out;" and that Linda was given the same instructions after she made her identification (Tr. Rem. 132).\*\*

Officer Bryant testified on remand that he was with Linda Smith throughout the lineup proceeding in the roll call room (Tr. Rem. 144); that Linda Smith made positive identifications of both Brown and Greenwood (Tr. Rem. 145); that Linda Smith and Louise Smith did not view the lineup together (Tr. Rem. 146); that as Mrs. Smith was leaving the area from which she made her identification, Linda Smith was brought up to the desk (from which identifications were made), and although they (Mrs. Smith and her daughter) passed, no words were exchanged (Tr. Rem. 146); that

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\*This testimony is flatly contradicted by mother's testimony, daughter's testimony, Officer Bryant's testimony, and Attorney Feldman's testimony, that mother and daughter had entered the room at the same time and remained in the room while each made her identification.

\*\*This testimony is consistent with the testimony of Mr. Feldman that the mother and daughter were seated in the back of the room after the initial identifications. It is inconsistent with the testimony of the mother and of the daughter, that each returned to her original seat.



after the lineup, Mrs. Smith and Linda went respectively to the extreme right rear and left rear of the room, in the presence of police officers (Tr. Rem. 149); and that Mrs. Smith and Linda did not return to the seats in which they had been seated earlier (Tr. Rem. 149, 150).\*

3. Identification of Greenwood at trial.

Mrs. Louise Smith was unable to identify Greenwood at trial. In this connection she testified as follows:

Q. "Do you see the person here in court today that you saw at that time come across the street to you?"

A. "I don't know."

Q. "Pardon me?"

A. "I don't know. I don't know."

Q. "You don't know if you see the person here today?"

A. "No, I can't -- I don't know. I mean if that is Greenwood, he don't look -- I mean he looks different, if that's him. If that's him, I can't --"

Q. "You are looking as somebody right now."

A. "I know they said Greenwood, but I don't know if it's him for sure."

Q. "The person you see sitting here you said something about him looking different?"

A. "Well, you said it was Greenwood when I came in the court and I mean I figured it was Greenwood but I don't know for sure if that's him."

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\*Mrs. Smith and her daughter each testified that after they made their identifications, they returned to their original seats. (Tr. Rem. 23, 37, 59).

Q. "Where did you get the name Greenwood?"

A. "Well, I mean you told me -- I mean all along -- I mean during the time we talked it was Greenwood."

Q. "When did you first hear the name Greenwood?"

A. "I -- during the lineup, I think that is the first time. Other than that I don't remember."  
(Tr. 55, 56)

Linda Smith however, was positive of her identification of Greenwood at trial, as follows:

Q. "Of course you can see the defendant seated here in the courtroom, is that correct?"

A. "Yes." (Tr. 100)

. . .

Q. "By Greenwood, do you mean the gentleman who is seated here that we have been discussing?"

A. "Yes." (Tr. 103)

4. The Trial Court's Ruling on Defendant's Motion to Suppress.

Following the testimony on remand (Tr. Rem. 156), the Court heard defendant's oral motion for suppression of his identification based upon:

(i) the Government's failure to establish probable cause for Greenwood's arrest (Tr. Rem. 156, 157);

(ii) the police lineup was held during a period of unnecessary delay (Tr. Rem. 158);

(iii) Greenwood was denied effective assistance of counsel at the police lineup, in violation of Wade-Stovall (Tr. Rem. 159); and

(iv) the lineup was unnecessarily suggestive (for the reason (a) that mother and daughter were permitted to make identification in each other's presence; and (b) that Greenwood's bandages were not removed prior to the holding of the lineup) (Tr. Rem. 159).

The Government presented argument in opposition to the defendant's motion (Tr. Rem. 161-169).

Thereupon, the Court denied defendant's motion from the bench, finding probable cause for Greenwood's arrest (Tr. 171); finding that Greenwood was represented by counsel (Tr. Rem. 171); and finding that the police lineup procedure was proper and not suggestive (Tr. Rem. 172).

The Court initially failed to rule on the defendant's contention that the lineup was held during a period of "unnecessary delay" in violation of Mallory. When requested to rule with regard to this contention (Tr. Rem. 172), the Court ruled against the defendant as follows:

THE COURT: The Court rules that the lineup was not for the purpose of holding him, that there was probable cause for holding him and that he was properly represented at the time, and that this would not be applicable to this particular case.

MR. HARRIS: I take it then the Court's ruling is that in holding the defendant in order to get a lawyer for him before the lineup was conducted was perfectly proper and that under that circumstance Mallory does not apply here?

THE COURT: That is correct.

The Court subsequently filed a written order consistent

with its ruling from the bench, on February , 1970 (order reproduced at page A - 26 in the Addendum).

5. The testimony at trial with regard to the offense on August 7, 1967.

Following the voir dire (Tr. 28-37), and opening statement on behalf of the Government (Tr. 37-41) Mrs. Nora Louise Smith,<sup>1</sup> age 41, of 1406 Ridge Place S.E., testified that on the night of August 7, 1967, she and her daughter Linda Smith, age 20, visited Mrs. Lois Moore (another daughter of Mrs. Smith) at 1733 T Street, S.E., Washington, D. C. (Tr. 49, 67); that "at about ten o'clock or eleven o'clock in the evening" (Tr. 51), Mrs. Smith and her daughter Linda left Mrs. Moore's apartment to return to their home (Tr. 68); that on their way home [walking north in the 1800 block of 17th Street, S.E., on the east side of the street]<sup>2</sup> they were approached by a boy coming from across the street [walking south in the 1800 block of 17th Street, S.E. on the west side of the street], later identified as William Brown (Tr. 52); and that Brown had a gun (Tr. 55). Over objections of Greenwood's counsel (Tr. 51, 52, 54), Mrs. Smith testified to statements by Brown that he (Brown) had a friend on the other [west] side of the street (Tr. 51, 55); that his friend had a gun (Tr. 59); that he (Brown) did not want money (Tr. 53, 54); and

<sup>1</sup>Also known as Louise Smith (Tr. 87).

<sup>2</sup>At the trial, a diagram was used to pinpoint the several locations pertaining to the offense. Because it was at first incorrectly drawn, the record is somewhat confusing on a first reading. For clarification, and based upon all of the testimony, the events have been reconstructed and are shown on the annotated map of the area included at page A - 33 in the Addendum to this Brief.

that he (Brown) "wanted to fuck." (Tr. 54). These statements of Brown's were not made in the presence of Greenwood (Tr. 51, 105, 106).<sup>1</sup>

Mrs. Smith testified that after Brown made the statements referred to above, another boy (later identified as Greenwood) also came up to her and Linda (Tr. 52); that Greenwood had a gun (Tr. 59); and that Greenwood made the statement "Do what my brother said" (Tr. 53, 70).

Mrs. Smith further testified that she and Linda were then directed to go into a nearby alley (see annotated map of area in the Addendum to this Brief) (Tr. 59, 60); that they were taken to an apartment building construction site in the alley (Tr. 59, 60);<sup>2</sup> and that Brown had intercourse with her at gun point (Tr. 60) while Linda Smith and Greenwood talked "on the other side of the building" (Tr. 60).

Although Mrs. Smith's testimony is somewhat confused on the point, it appears from her testimony and her daughter's testimony, that after Brown had finished with Mrs. Smith, he and Mrs. Smith went over to where Greenwood and Linda were (the other side of the building) (Tr. 64, 104); that Greenwood then stated that "Linda wouldn't submit to him" (Tr. 61, 104); that Brown's

<sup>1</sup>It is Greenwood's contention that Brown's statements were erroneously allowed into evidence in that they were not made in Greenwood's presence and are of no probative value against Greenwood. However, in light of the other testimony (that Greenwood had a gun; and that Brown carried out his stated intention), it does not appear that these statements materially prejudiced Greenwood's case. The point is therefore not briefed.

<sup>2</sup>The testimony of Officer Cass locates the offense at 1708 T Street, S.E. (Tr. 127).



response was that "he would take care of her" (Tr. 61, 65); that Greenwood and Mrs. Smith then left the area and returned to where she and Brown had been originally, leaving Brown and Linda together (Tr. 61, 104).

Mrs. Smith testified that after she and Greenwood had left Brown and Linda, Greenwood stated "he [Greenwood] did not want to do what he [Brown] was doing" (Tr. 65); that "he [Greenwood] was doing this for his brother [Brown] because his brother was sick and he [Brown] had just come from St. E's [Saint Elizabeth's Hospital] and that was the only way he [Greenwood] could help his brother [Brown] by helping him do these things" (Tr. 65).

Mrs. Smith further testified that Greenwood "had his hand up to his head like he was upset about it" (Tr. 65); that Greenwood said he would get Brown and take him away from Linda ("that he would get him out of there if he had to go in and drag him out himself") (Tr. 66); and that Greenwood then went over to where Brown was, and told Brown "to come on, let's go" (Tr. 66, 86). [Generally consistent with this testimony, Linda Smith testified later that "Greenwood kept hollering, telling him [Brown] to hurry up and Brown told him [Greenwood] to wait. And Greenwood came over with my mother and before he got over Brown had got up and I had my clothes on and they was -- he said, 'man let's go.'" (Tr. 105).]

Mrs. Smith testified Greenwood never held her in any

way (Tr. 86), never hurt her (Tr. 86), and did not hurt her daughter Linda Smith (Tr. 87).

Mrs. Smith testified that (during the time Mrs. Smith and Greenwood were talking, and while Brown was with Linda) Greenwood's gun was "in his pants -- in back of his pants somewhere" (Tr. 63). She further testified Greenwood told her "to take his gun" (Tr. 66), that she took and held Greenwood's gun in her hands "for a couple of minutes" (Tr. 84, 85), and that she then returned the gun to Greenwood (Tr. 66, 85), because she was afraid that if she tried to use the gun, she or her daughter might have gotten hurt (Tr. 72, 73).

Linda Smith testified (Tr. 96 et seq.) that after leaving her sister's apartment at 1733 T Street, S.E., she and her mother were approached by a boy (later identified as Brown) as they passed the alley (Tr. 102, 112); that Brown made the statements "Stop or I will shoot, don't holler" and "Turn around and keep walking. My friend across the street has a gun too" (Tr. 103, 112); that Brown said "he wanted to fuck" (Tr. 105); that Greenwood subsequently crossed the street and took a gun out of his pocket (Tr. 103, 112); that they were directed to an apartment construction site in the alley; that Greenwood and Linda went to the "outer part of the building, between the building and another house," while Brown took Linda's mother "on one side of the building" (Tr. 103, 112).

Linda further testified that Greenwood first told

her to take her clothes off and that she had said she wouldn't (Tr. 104, 107); that Greenwood then stated that "he didn't want to do that", and "he was out helping his brother because his brother had just come from Saint Elizabeth's" (Tr. 104); that after Brown came over with her mother, Greenwood had said to Brown that Linda wouldn't submit to him; and that Brown then stayed with Linda and Greenwood "went back over with my mother" (Tr. 104).

Linda testified that Brown had sexual intercourse with her at gunpoint (Tr. 105); that thereafter Greenwood and her mother came over (Tr. 105, 110); that the four then walked out of the alley; that Linda and her mother then went "down 17th Street" [north], and Brown and Greenwood walked "up the other way" [south] (Tr. 111).

On cross examination, Linda testified that Greenwood never touched her, and never harmed her:

Q. "Other than you said he led you by the arm did he ever touch you?"

A. "No."

Q. "Other than the fear you described at having a gun pointed at you, did he in any way harm you?"

A. "No." (Tr. 122, 123)

Linda further testified Greenwood was not present at any time during Brown's assault upon her:

Q. "Did Greenwood ever come over in the room you were with when you were with Brown?"

A. "No."

Q. "He never came in there at all, and stayed with your mother all the time?"

A. "Yes." (Tr. 124)

[Mrs. Smith's testimony is consistent. She testified Greenwood and she came out "and left Linda and Brown in there" (Tr. 61).

Later, she went with Greenwood "over to where Linda and Brown was and Linda was fixing up her clothes and so they came on out and we all came out together." (Tr. 66)]

The Government also offered corroborating testimony of Dr. Timothy Tomasi (Tr. 137), and Detectives Cass (Tr. 124) and Holden (Tr. 130).

6. Motions; Instructions to the Jury; Jury Verdict.

At the conclusion of the Government's case (Tr. 152) counsel for Greenwood informed the Court that Greenwood would not take the stand (Tr. 152). The trial court made an objective determination under Luck that Greenwood's prior conviction (UUV) would not be admissible against him (Tr. 153). The jury was then requested to leave the Courtroom (Tr. 154) and defendant renewed and argued his motion to dismiss for undue delay (Tr. 154). The motion was "overruled" (Tr. 162).

Defendant further moved to dismiss on the ground the Government had failed to prove that Greenwood "aided and abetted the defendant Brown" (Tr. 157). The motion was "overruled" (Tr. 162).

The defendant further requested certain instructions

with regard to the meaning of the term "aiding and abetting" (Tr. ), the requests were opposed by the Government (Tr. 160, 161), and were denied by the Court (Tr. 162).

Argument on behalf of the Government (Tr. 167-174) and on behalf of the defendant (Tr. 174-181) was heard.

The Court then instructed the jury with regard to the respective functions of the Court and jury (Tr. 183, 184); with regard to the credibility of witnesses (Tr. 184, 185); with regard to defendant's failure to testify (Tr. 186); with regard to the presumption of innocence (Tr. 186); with regard to the Government's burden of proof (Tr. 186); with regard to the meaning of reasonable doubt (Tr. 186, 187); with regard to direct and circumstantial evidence (Tr. 187, 188); with regard to elements of the offense of rape (Tr. 189); with regard to corroboration of the corpus delicti and corroboration in the matter of identity (Tr. 190, 191); with regard to the lesser-included offense of assault with intent to commit rape under either or both Counts One and Three of the indictment (Tr. 191), and the elements of such lesser-included offense (Tr. 191); with regard to the Government's burden of proof beyond a reasonable doubt (with regard to the element of specific intent) (Tr. 192); with regard to the meaning of specific intent and general intent (Tr. 192, 193); with regard to the requirement of corroboration (Tr. 193); with regard to the elements of offense of assault with a dangerous weapon (Tr. 194, 195); and with regard to the meaning of "aiding



and abetting" in the commission of an offense (Tr. 195, 196). At the conclusion of these instructions the Court gave its version of the "Allen" charge (Tr. 197). Both counsel for the Government and counsel for the defendant indicated they were satisfied with the instructions (Tr. 198). The jury was excused from the jury room to commence deliberations at 4:08 p.m. on Monday, January 13.

At 4:55 p.m., the jury entered the Courtroom and the Foreman announced: "the jury has agreed upon a verdict" (Tr. 200). The following then occurred:

THE DEPUTY CLERK: "What say you as to the defendant Benjamin O. Greenwood, III, on count one of the indictment charging rape?"

THE FOREMAN: "Not guilty."

THE DEPUTY CLERK: "What say you as to the defendant on the lesser-included offense of assault with intent to commit rape under count one?"

THE FOREMAN: "I don't understand you. Is that count two?"

THE DEPUTY CLERK: "No, count one, the lesser-included offense under count one of the indictment, assault with intent to commit rape."

THE FOREMAN: "It is not on the indictment."

THE COURT: "The Court instructed you on this; it is a lesser-included offense. Perhaps we should give you a verdict sheet on this. Do you think so?:

THE FOREMAN: "Your Honor, could I tell you what we decided in there or only what you asked me?"

THE COURT: "I think that at this time we better stop because when you found the defendant not guilty as to count one and as to count three, then you should go on and consider the lesser-included offense, as instructed."

THE FOREMAN: "Which was counts two and four."

THE COURT: "No, they are additional counts."

THE FOREMAN: "Very well."

THE COURT: "Very well. At this time if you just have a seat I would like to give you that instruction again."  
(Tr. 200, 201)

There followed a colloquy at the bench outside the hearing of the jury. Counsel for Greenwood objected to any further instructions (Tr. 202) on the ground that the jury had been fully instructed and both counsel had stated they were satisfied with the instructions (Tr. 202, 203). Counsel for Greenwood then requested that the jury be excused to return the following day, it appearing that it was already after 5:00 p.m. (Tr. 203). The request was refused (Tr. 204). The Court then re-instructed the jury with regard to the lesser-included offense (of assault with intent to commit rape) under Count One and Count Three (Tr. 205), stating that the jury would be permitted to find the defendant guilty of such lesser-included offense under Count One, and if the jury should find the defendant not guilty under Count Three, then the jury would be permitted to find the defendant guilty of the lesser-included offense also under Count Three (Tr. 205, 206). The Court then read the three elements of this lesser-included offense, and at 5:09 p.m., again excused the jury. (Tr. 206, 207).\*

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\*The instruction was as follows: "The essential elements of the offense of assault with intent to commit rape, each of which the Government must prove beyond a reasonable doubt, are: (1) That the defendant made an assault upon the complainant; and (2) that he did so with specific intent to have sexual intercourse with the complainant; and (3) that he did so with the purpose to carry this intent into effect by force and against the will of the complainant. Those are the elements of assault with intent to commit rape. All of them must be present to find him guilty." (Tr. 206).

The Court failed to re-instruct the jury with regard to the requirement for corroboration, with regard to reasonable doubt, with regard to the meaning of specific intent, or with regard to any of the other instructions previously given.

At approximately 5:30 p.m. the Court received a note from the jury reading: "What does the law say on the guilt of an accomplice to the crime?" (Tr. 207). At this point counsel conferred off the record, and the jury was then told they would be excused and that further instructions would be given at 10:00 o'clock the following morning (Tr. 207, 208).

The following morning the Court had before it two notes from the jury. The first reading: "Could we please have the written definition read by the Judge as to assault with intent to commit rape?"; and the second reading: "What does the law say on the guilt of an accomplice to the crime?" (Tr. 218).

Prior to re-instructing the jury, counsel for Greenwood pointed out to the Court that inasmuch as the jury had already found Greenwood not guilty of rape under Count One, the jury must have found "that he wasn't there" (i.e., that he had not aided and abetted Brown, as there was no evidence that Brown had not committed rape) (Tr. 211). Counsel for Greenwood suggested that the lesser-included offense should be withdrawn from the jury completely (Tr. 211). Counsel for Greenwood further requested an instruction of simple assault under Count One (Tr. 211).

The Court then advised counsel that it would not

give the jury a written instruction (Tr. 213); that she would again read them the definition of assault with intent to commit rape (Tr. 213), the definition of assault and specific intent and corroboration (Tr. 213). With regard to the jury's second question (regarding "the guilt of an accomplice") the Court advised it would give the instruction on aiding and abetting, and would read the possible verdicts in the case (Tr. 214).

Counsel for Greenwood again requested a simple assault instruction (Tr. 215, 216), and was denied by the Court (Tr. 217).

The jury entered the Courtroom at 10:32 a.m., January 14, 1969, at which time the Court again read to the jury the essential elements of the offense of assault with intent to commit rape (Tr. 219); the definition of assault (Tr. 219); the requirement of proof beyond a reasonable doubt with regard to the element of specific intent (Tr. 220); the meaning of intent (general intent only) (Tr. 220); the requirement for corroboration with regard to the corpus delicti and the identity of the defendant (Tr. 221); and instructed that the jury could find the defendant guilty of a crime charged if the jury found he was aiding and abetting another in the commission of such crime. The Court then stated the possible verdicts that could be reached (Tr. 223, 224).

Counsel for Greenwood renewed his prior objections,

stating "there is no evidence to justify the submission of the crime of assault with intent to commit rape" (Tr. 224). The jury left the Courtroom at 10:40 a.m. to resume deliberations.

Subsequently, the jury returned another note to the Court reading "Does the aiding and abetting clause apply equally to having carnal knowledge and intent to rape?" (Tr. 225). At this point counsel for Greenwood moved for a mistrial on the ground that further instructions to the jury would necessarily unbalance the instructions (Tr. 226). The Court stated it intended to tell the jury that the answer to the question is "Yes" (Tr. 226). Counsel for Greenwood then pointed out that the question was "unintelligible" and that there is no crime called "intent to rape" (Tr. 227). It was further suggested that if the Court should re-instruct the jury, the jury should be re-instructed as to all instructions (Tr. 227). Thereupon, at 11:42 a.m., the jury entered the Courtroom (Tr. 229) and the Court stated as follows:

"Ladies and gentlemen of the jury, you have sent out a question asking: Does the aiding and abetting clause apply equally to having carnal knowledge and intent to rape? The answer is yes. Now bear in mind all of the other instructions completely that the Court has given you, and come back with the answers to the various and sundry points, please, if you are able to do so."

Mr. L'Hommedieu again objected to the instruction, contending that there is no such crime as "intent to rape" and that the Court's instructions to the jury were misleading (Tr. 230, 231). The jury entered the Courtroom at 11:54 a.m. and returned the following verdict:



. Not guilty on Count One of the indictment (Rape).

Guilty of the lesser-included offense under  
Count One (Assault With Intent to Commit Rape).

Guilty on Count Two of the indictment.

Not guilty on Count Three of the indictment (Rape).

Guilty of the lesser-included offense under  
Count Three (Assault With Intent to Commit Rape).

Guilty on Count Four of the indictment.

The jury was polled, and each individual juror stated his or her  
agreement with the verdict as announced by the Foreman (Tr.  
233 et seq.).

## ARGUMENT

- I. THE POLICE LINEUP IDENTIFICATION OF THE APPELLANT SHOULD HAVE BEEN SUPPRESSED AS THE FRUIT OF APPELLANT'S ILLEGAL DETENTION.

[Appellant desires the Court to read, in connection with this argument, pages 18 to 23 of this Brief ("Appellant's Arrest on September 12, 1967") and the transcript on remand, pages 99-127 and pages 147-149.]

- A. The Government failed, on remand to sustain its burden of proof that there was probable cause for appellant's arrest.

As fully set forth in the Statement of Facts, to which reference is made, appellant was arrested without a warrant near Kramer Junior High School, 17th & Q Streets, S.E. on September 12, 1967, at about 8:45 p.m., by Officer Carnwell C. Dean, based only upon the following:

1. A radio run for robbery at 18th & Q Streets -- nearly two blocks from the site of arrest -- received by Officers Bryant and Dean [see annotated map at p. A-31 in the Addendum].
2. The report of an unidentified cab driver, received by Officer Bryant, that "the man had jumped the fence."
3. The witnessing by Officers Bryant and Dean of an unidentified person running through the school playground.
4. Officer Bryant's instructions to Officer Dean to go around to the other side of the school [to apprehend Greenwood].

In response to the question "Would you tell us what, if anything, you saw him [Greenwood] do before you arrested him?" Officer Dean testified "I seen [sic] him do nothing before I arrested him." (Tr. Rem. 116). Officer Dean further testified he was acting on information from Officer Bryant (Tr. Rem. 116). However, the record

shows that Officer Bryant knew nothing more than Officer Dean knew (see "Appellant's Arrest on September 12, 1967," supra).

Some minutes later, the victim of the alleged pocketbook snatching, Regina Harvey, was not able to identify Greenwood (Tr. Rem. 101, 110), and identified one William Brown, arrested inside the playground at about the same time, as the person who snatched her pocketbook (Tr. Rem. 110).

It is appellant's contention that as a matter of law there was no probable cause for his arrest in these circumstances. Conceding that Officer Dean had reason to believe a felony had been committed (based upon the radio run for robbery), there was no reasonable basis for him to believe that Greenwood had committed that offense. Officer Dean had no prior description of any suspect. There were no facts linking the person seen in the playground to the reported offense. There were others in the playground [Brown and Blagmon were arrested in the playground]. To run in a playground or to climb a fence are acts in themselves innocent -- certainly not acts from which it may be reasonably inferred that the actor has committed a felony.

In Henry v. United States, 361 U.S. 98, 80 S. Ct. 168 (1959), the Supreme Court stated, with respect to probable cause, as follows:

"Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed. [citing cases] It is important, we think that this requirement be strictly

enforced, for the standard set by the Constitution protects both the officer and the citizen." 361 U.S. at 102. ...

The Court further stated:

"To repeat, an arrest is not justified by what the subsequent search discloses. Under our system suspicion is not enough for an officer to lay hands on a citizen." 361 U.S. at 104.

In the case of Greenwood, at best Officer Dean may have had suspicion. Nothing more appears from the record. Under the standard set forth in Henry, the arrest was constitutionally invalid.

After appellant's arrest, he was brought around to the front of the school, and placed in a police cruiser (Tr. Rem. 101, 147, 148). Shortly thereafter (or at about the same time; the record is not clear), Regina Harvey (the victim of the alleged pocket-book snatching) positively identified William Brown as having committed that offense (Brown having been arrested inside the school grounds at about the same time). Officer Bryant testified that Regina Harvey could not identify Greenwood (Tr. Rem. 101, 110).\*

Following Greenwood's arrest, he was identified (apparently in one man "show-ups") in connection with two other offenses reported as having occurred in the vicinity of the school grounds at about the same time (see "Appellant's Arrest on September 12, 1967," supra).

Appellant's initial contention is that the Government cannot rely on the subsequent identifications to supply probable

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\*Subsequently, only Brown was indicted for this offense. (See Course of Proceedings, Addendum, p. A-21.)

cause, since Greenwood was already under arrest (see Henry v. United States, supra: "An arrest is not justified by what the subsequent search discloses." 361 U.S. at 104).<sup>1</sup>

Moreover, the events in front of the school after Greenwood's arrest do not support Greenwood's detention for the following reasons:

(1) The purse snatching involving Regina Harvey:

As reported above, Regina Harvey could not identify Greenwood.<sup>2</sup> Clearly, no probable cause may be found in connection with this offense.

(2) The ADW against Sonny Shaw:

Sonny Shaw testified that Greenwood had broken up a fight between Shaw, Blagmon and Brown (Tr. Rem. 123); that he considered Greenwood may have "saved his [Shaw's] life" (Tr. Rem. 126); and that he [Shaw] identified Blagmon and Brown to the police as the persons who had drawn the guns on him (Tr. Rem. 124, 125). Shaw's testimony is entirely credible and consistent. He has no reason to testify falsely.

Officer Bryant testified that Shaw identified Greenwood as having assaulted Shaw with a gun (Tr. Rem. 101, 102, 148). Appellant contends this testimony is simply

<sup>1</sup>Of course, the one man "show-ups" in which Greenwood was allegedly identified were in themselves defective under Wade-Stovall, since they occurred after arrest and without counsel. As such, for this reason also, the police should be precluded from relying on the identifications made to supply probable cause.

<sup>2</sup>Despite Officer Bryant's testimony to the contrary on the second day of the hearings on remand (Tr. Rem. 150), all of the remaining evidence points to the truth of this assertion. Officer Bryant so testified (Tr. Rem. 101, 110). The Grand Jury returned an indictment only against Brown. Form P.D. 251 for this offense refers only to Brown (see Addendum, p. A-7). Form P.D. 111 asserts Miss Harvey did not identify Greenwood (see Addendum, p. A-13).



incredible. No evidence tending to corroborate this testimony was introduced; all of the available evidence is to the contrary. No complaint was ever made against Greenwood. No indictment resulted against Greenwood.

- No consistent statements were introduced. Officer Bryant's testimony was clearly interested (it appearing that the question of probable cause for arrest was in issue). Finally, Officer Bryant's testimony was conflicting as to other issues, raising serious questions as to its reliability in regard to this issue.\*

It is therefore respectfully urged that the testimony concerning the Shaw incident, taken as a whole, also does not support the trial court's finding that there was probable cause for Greenwood's arrest, and that the ADW charges on which Greenwood was "booked" were fabricated in order to hold Greenwood for the purpose

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\*For example, Officer Bryant testified on January 16, 1970 (Tr. Rem. 101, 110) that Regina Harvey (the victim of the pocketbook snatching) could not identify Greenwood; on January 19 (following the damaging testimony of Sonny Shaw) Officer Bryant testified unequivocally to the contrary (see Tr. Rem. 150). Officer Bryant also testified (Tr. Rem. 104) that charges were "No-Papered" because two young girls, Yvette Belt and Geraldine Gaines, "were not with us at the time". It is a matter of record however, that the two girls were at police headquarters at this time, evidenced by their signed and dated statements included in the Appendix to this Brief. And as indicated in the footnote on p. 22, Officer Bryant's testimony regarding the identification of Greenwood by Geraldine Gaines, as having assaulted the janitor with a gun, is not consistent with Miss Gaines' written statement (Addendum p. A-9).

of the lineup conducted on the following day.<sup>1</sup>

(3) The assault on Geraldine Gaines and Yvette Belt:

The only evidence linking Greenwood to this offense is again the testimony of Officer Bryant (shown to be unreliable in other regards; see footnote at p. 51) that after Greenwood had been brought around to the front of the school, the complaining witnesses (two young girls) identified Greenwood as having come into the playground and as having stated "here comes the police, here comes the police." (Tr. Rem. 102, 110). There was no showing that Greenwood did anything to assist Blagmon and Brown in connection with the assault on these girls, or to assist in their escape. It is simply not an offense to report the arrival of the police. In the context of the presently strained relations between the police and certain segments of the community, such statement attributed to Greenwood, without some further evidence that Greenwood had knowledge of the assault in the playground or otherwise, appears to be unexceptional.<sup>2</sup>

<sup>1</sup>In the alternative, it is suggested the police proceeded in reckless disregard of appellant's rights, by failure to conduct any investigation concerning the true circumstances with regard to the assault on Harry Shaw. In this connection, in response to the question "Did you tell the police that he [Greenwood] had broken up the fight?" Harry Shaw testified that "Well, they didn't give me time to tell them nothing." (Tr. 125). Apparently, the police proceeded upon an assumption that Greenwood was guilty of something, and that it didn't particularly matter of what.

<sup>2</sup>On October 17, 1968 in Criminal Case No. 1443-67, Chief United States District Judge Curran apparently agreed, and dismissed the indictment as to Greenwood based on the complaints of these girls, following the Government's opening statement, on the ground that as a matter of law there was insufficient evidence to connect Greenwood to this offense.

In light of the above, and the unreliability of Officer Bryant's testimony previously adverted to, the Government failed to establish probable cause for appellant's arrest in respect to this offense.

- B. The police failed to take appellant before the nearest available commissioner "without unnecessary delay", in violation of Rule 5(a), Federal Rules of Criminal Procedure, and Mallory.

Rule 5(a), Federal Rules of Criminal Procedure requires that an officer making an arrest shall take the arrested person before the nearest available commissioner "without unnecessary delay".

In the case of Greenwood, it is undisputed that he was arrested at about 8:45 p.m. the night of September 12, 1967, upon a charge of ADW (see Statement of Facts); that he was detained overnight at the 11th Police Precinct; that the following morning, commencing at about 9:30 a.m., and over the objections of an attorney from the District of Columbia Legal Aid Agency, he was made to appear in a police lineup at police headquarters, for the purpose of being viewed by a number of complaining witnesses in open crimes (rape and robbery) unrelated to the crime for which he was arrested; that he was identified by Mrs. Louise Smith and Linda Smith, in connection with a rape that had occurred on August 7, 1967, some five weeks prior to the lineup; and that it was only after the lineup, ending at about 10:45 a.m. on September 13, 1967 that Greenwood was taken to the Court of General Sessions for presentment, charges resulting from the lineup identification.

Since magistrates take the bench in the Court of General Sessions at 9:30 a.m. (Tr. Rem. 72), there can be no question but that there was failure on the part of the police to comply with the requirement of Rule 5(a), and that the only reason for the continued detention of appellant without presentment, was the desire of the police to conduct the lineup proceeding.

- C. The lineup identification of appellant was the fruit of an illegal detention and was therefore inadmissible.

Appellant has shown above that (1) there was no probable cause for his arrest and (2) that he was illegally detained in violation of Rule 5(a) and Mallory.

1. Lack of probable cause.

It has been held without exception that where there is no probable cause for arrest (i.e. in the case of an arrest that is constitutionally invalid), evidence of any kind obtained as a result of the invalid arrest may not be used against the person arrested. Henry v. United States, 361 U.S. 98, 80 S. Ct. 108 (1959). Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. <sup>407</sup> (1963). As the Supreme Court stated in Wong Sun:

"In order to make effective the fundamental constitutional guarantees of sanctity of the home and inviolability of the person, Boyd v. United States, 116 U.S. 616, 6 Sup. Ct. 524, 29 Law Ed. 746, this Court held nearly half a century ago that evidence seized during an unlawful search could not constitute proof against the victim of the search. Weeks v. United States, 232 U.S. 383, 34 Sup. Ct. 341, 58 Law Ed. 652. The exclusionary prohibition extends as well to the indirect as to

the direct production of such invasions." Silverthorne Lumber Company v. United States, 251 U.S. 385, 40 Sup. Ct. 182, 64 Law Ed. 319 (1920).

The Court in Wong Sun quoted with approval from Justice Holmes' opinion in Silverthorne, supra, as follows:

"The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court but it shall not be used at all. Of course, this does not mean that the facts thus obtained become sacred and inadmissible. If knowledge of them is gained from an independent source, that may be proved like any others. But the knowledge gained by the Government's own wrong cannot be used by it in the way proposed." (251 U.S. at 392, 40 Sup. Ct. at 183) (emphasis supplied).

More recently, the Supreme Court has reaffirmed these principles in the case of Davis v. Mississippi, 394 U.S. 721, 1394 (1969). In reversing a conviction based upon fingerprint evidence obtained following an arrest without probable cause, the Supreme Court stated:

"Our decisions recognize no exception from the rule that illegally seized evidence is inadmissible at trial, however relevant and trustworthy the seized evidence may be as an item of proof."

See also Bynum v. United States, 104 U.S. App. D.C. 368, 262 F.2d 465 (1958).

Following Davis and Bynum, there can be no question that appellant's lineup identification, obtained at a time he was illegally detained pursuant to an arrest that was constitutionally invalid, could not have been used against appellant at trial, and its use requires that appellant's conviction be reversed.



2. Violation of Appellant's Mallory rights.

Appellant relies primarily on the decision of this Court in Adams v. United States, 130 U.S. App. D.C. 203, 291 F.2d, 547 (1968). In Adams (as in the case of Greenwood), the accused had been arrested on one charge, and was detained beyond the limits of Rule 5(a) for investigatory reasons vis-a-vis other crimes. The accused was subsequently identified in a lineup conducted during a period of "unnecessary delay", and tried and convicted on charges resulting from this identification.

The question before the Court in Adams was whether the lineup identification testimony was admissible in light of the admitted violation of Rule 5(a). In reversing and remanding for a new trial, this Court stated:

"To continue their [the accused] custody without presentment for the purpose of trying to connect them with other crimes is to hold in custody for investigation only, and that is illegal; its operative effect is essentially the same as a new arrest and, if not supported by probable cause, it is an illegal detention." 399 F.2d at 577.

This Court further stated:

"In deciding against admissibility, we emphasize that what the defendant acquires by that presentment is, first, judicial advice of his rights, including the provision of counsel; and second, the opportunity to regain his freedom forthwith by persuading the magistrate that there is no probable cause to hold him for the crime for which he was arrested.\* These are important legal

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\*This second reason is especially compelling in the case of Greenwood, for the reasons set forth in part "A" of this Argument I.

rights which Rule 5(a) was designed to secure -- so important, indeed, that the Supreme Court has ruled that the exclusion of otherwise admissible evidence is not too high a price to pay to assure their availability to all persons." 399 F.2d at 579.

There is nothing on the facts in the case of Greenwood to distinguish it from Adams. Without reference to whether or not there was probable cause initially to arrest Greenwood, the decision of the police to hold Greenwood over-night and to place him in a lineup the following morning with respect to unrelated crimes, made Greenwood's detention illegal under Adams, and any evidence resulting from his illegal detention was therefore per se inadmissible.\*

More recently, this Court has again considered the question of lineups in violation of Mallory. In Williams v. United States, 419 F.2d 740 (decided October 23, 1969), this Court refused, in a 5-3 en banc decision, to invalidate a conviction based on lineup identification testimony, where the lineup was held prior to the decisions of the Supreme Court in Wade-Gilbert-Stovall, even though there had been a violation of Rule 5(a). However, this Court expressly limited its decision to pre-Wade-Stovall lineups:

"The considerations examined by the Supreme Court in Stovall lead to the conclusion that we should not characterize what the police did here in 1965 as contrary to Rule 5(a) and Mallory.

\*It may be said that Greenwood has an even stronger claim to improper police conduct than did the accused in Adams. For in Adams, the lineups that were held involved witnesses to similar modus operandi crimes. Greenwood, on the other hand, had been charged with ADW; yet his lineup involved open rape and robbery offenses.

Read Williams

Adams.

Different considerations apply to identifications after Wade, for then police were fairly on notice that the right to counsel was a generally necessary ingredient in lineups."<sup>1</sup>

In this connection, appellant would respectfully recall to this Court the following reference in Judge Wright's dissent in Williams, supra, to the views of Judge Burger (now Chief Justice Burger) in this question:

"The view that Mallory applies to lineups is not novel doctrine. It was taken by Judge Burger (now Chief Justice Burger) in his concurrence in Adams, supra. Judge Burger, the author of four of the five opinions in which, prior to Wade, Mallory was not applied to lineups,<sup>2</sup> stated:

\*\*\*The reason our earlier holdings do not apply is that the Supreme Court's decision in United States v. Wade, 388 U.S. 218, 87 S. Ct. 1926, 18 L.Ed.2d 1149 (1967), has made the underlying rationale of those cases irrelevant.\*\*\* It was natural for the cases following Mallory to concentrate on the exclusion of utterances, but not other forms of evidence. But Wade has changed this. Now that the right to counsel is an integral part of the lineup procedure, the warnings that are given at presentment and the opportunity to have counsel appointed are highly relevant to the lineup situation. See Fed.R.Crim.P. 5(b); 18 U.S.C. §3006A(b) (1964). Since the Mallory rule was a response to the protections afforded by prompt presentment, it is appropriately applied to the lineup situation in the wake of Wade.<sup>3</sup> 130 U.S. App. D.C. at 209, 399 F.2d at 580." 419 F.2d at 749.

Adams is therefore controlling, and that for the reasons therein stated, appellant's conviction must be reversed and the case remanded for a new trial.

<sup>1</sup>The Court suggests in a footnote the "possibility of exceptions if the defendant is provided 'substitute counsel.'" Appellant contends he was not furnished effective substitute counsel. See Argument II, infra.

<sup>2</sup> Footnote omitted.

<sup>3</sup> Footnote omitted.

So now question is whether counsel was there. If so, time of detention for legit purpose, in a Mallory violation

Even if D has his / has right there was probable cause for arrest.

II. APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE LINEUP, IN VIOLATION OF WADE-STOVALL.

[Appellant desires the Court to read, in connection with this argument, pages 23 to 31 of this Brief ("The Lineup"), and pages 68-96 of the transcript on remand.]

In United States v. Wade, 388 U.S. 218, 87 Sup. Ct. 1926 (1967), the Supreme Court held that a police lineup confrontation for the purpose of obtaining an identification is a critical stage of the proceedings, at which counsel must be present to represent the accused. In the case of Gilbert v. State of California, 388 U.S. 263, 87 Sup. Ct. 1951 (1967), the Supreme Court held that lineup identification testimony with regard to a lineup at which the accused did not have the assistance of counsel is per se inadmissible. And in the companion case of Stovall v. Denno, 388 U.S. 293, 87 Sup. Ct. 1967 (1967), the Supreme Court refused to give retroactive application to Wade and Gilbert, holding that these cases affect only confrontations for identification purposes conducted without counsel after the date of decision (June 12, 1967).

The police lineup in the case of Greenwood was held on September 13, 1967, after the date of decision in Wade-Stovall, and Greenwood therefore was entitled to all of the protections required under these decisions.

Mr. Jon Feldman, at the time a staff attorney with the District of Columbia Legal Aid Agency, was present at the lineup proceeding pursuant to a police request to the Agency for the presence of a lawyer. The request was apparently received on the same morning

as the lineup. Mr. Feldman testified that he had little opportunity to consult with Greenwood or the other accused present at the lineup (Tr. Rem. 72, 90); that he did not consider that he represented any of the accused (Tr. Rem. 90); that he regarded his purpose only as seeing that the lineup would be objectively fair (Tr. Rem. 90); that he had not spoken to any of the witnesses who would view the lineup (Tr. Rem. 72, 89); that he did not know who the witnesses would be (Tr. Rem. 89, 91); that he did not know in connection with what kinds of crimes the witnesses would view the lineup (Tr. Rem. 89); that he was furnished no prior descriptions of the accused (Tr. Rem. 89, 92); and that he did not know anything about the offense involving Louise Smith and her daughter Linda (Tr. Rem. 93).

It is clear that Wade intended something more than a mere requirement that a lawyer should be present at a police lineup confrontation. There can be no doubt that Wade intended that an accused is entitled to effective assistance of counsel at an identification confrontation. Nor can it be doubted that in order to render effective assistance, counsel must have an opportunity to consult with the accused or suspect, and to learn of the facts and circumstances concerning the accusations and concerning the nature of the proceedings. At a minimum, it is suggested, counsel should be informed regarding the circumstances of arrest and the charges upon which the accused is held; the names of the witnesses that are to view the lineup; the nature of the offenses involving such witnesses; and regarding any prior descriptions given the police by such witnesses.



In the case of Greenwood, the record shows only that a lawyer was present to observe the proceedings; and in this connection, that he made general suggestions that the police were free to follow or disregard at their pleasure. The evidence on remand clearly shows that Greenwood individually had no assistance of counsel.

Appellant urges this Court to rule consistently with the statement in its so-called "Allen" order, issued October 16, 1969 in the matter of Harold A. Spriggs v. Jerry V. Wilson, et al.

(Appeal No. 23548):

"The motion for stay is denied. In so doing, we deem it appropriate to state, as we suggested in United States v. Allen, U.S. App. D.C. , 408 F.2d 1287 (1969), that on this record we see no reason, and the Government at oral argument has offered none beyond an unsubstantiated reference to convenience, why the right to effective assistance of counsel does not require that the description of the suspect as given to the police be made available to counsel for the appellant at the lineup. See United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967); Stovall v. Denno, 388 U.S. 293 (1967)."

Mr. Feldman was not furnished prior descriptions of the suspect. That such failure to furnish descriptions was prejudicial is clear. Of the eight men placed in the lineup, only Greenwood had bandages on his fingers. Both Mrs. Louise Smith and her daughter Linda testified that their identifications of Greenwood were based in significant part on the fact that Greenwood had bandages on his fingers the night of the offense (August 7) and again at the lineup (September 12). Linda Smith, in her description furnished to the

*Why would these  
have been thought  
to persist?*

police, made specific reference to Greenwood's bandages: "He had two of his fingers on the right hand bandaged up." (Tr. Rem. 97). Mrs. Smith testified she also had told the police about the bandages (Tr. 57). Had Mr. Feldman been apprised of these prior descriptions, it is inconceivable that he would not have requested that the bandages be removed. And whether Mrs. Smith would have made a positive identification of Greenwood without the bandages, is a matter of extreme doubt. According to her testimony, it was the fact that she noticed the bandages that initially dispelled her uncertainty. (Tr. 57).\*

For the foregoing reasons, appellant contends he did not have the effective assistance of counsel at the lineup and that his rights under Wade-Stovall were abrogated.

III. THE LINEUP IDENTIFICATION PROCEEDINGS IN WHICH APPELLANT WAS IDENTIFIED WERE UNNECESSARILY SUGGESTIVE AND CONSTITUTED A DENIAL TO APPELLANT OF DUE PROCESS OF LAW.

[Appellant desires the Court to read, in connection with this Argument, pages 23 to 31 of this Brief ("The Lineup"); the testimony of Mr. Jon Feldman at pages 68-96 of the transcript on remand; and Mr. Feldman's notes made in connection with the lineup proceedings, introduced into evidence as defendant's exhibits nos. 1 and 2 on remand.]

In Stovall v. Denno, 388 U.S. 293, 87 Sup. Ct. 1967 (1967) the Supreme Court affirmed that a confrontation for the purpose of identification may be "so unnecessarily suggestive and conducive to irreparable mistaken identity" as to constitute a denial of due

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\*See also Mrs. Louise Smith's identification testimony at p. A-28 in the Addendum.

process of law. In so doing the Court stated that a claimed violation of due process of law in the conduct of a confrontation "depends on the totality of the circumstances surrounding it." 388 U.S. at 302.

Appellant Greenwood contends that his identification at the lineup was "unnecessarily suggestive" within the meaning of Stovall as a matter of law, and that the District Court findings on this issue are not supported by the evidence:

First: As referred to in Argument II, appellant was identified from a lineup in which he was the only person having bandages on his right hand, and in circumstances where the police had been furnished prior descriptions by both Mrs. Smith and Linda Smith in which reference to such bandages was made. Mrs. Smith in her first identification of Greenwood evidenced considerable uncertainty (see "Testimony of the Complaining Witnesses" at pp. 23-26 in this Brief; see also her testimony at pp. A-28 et. seq. in the Addendum). It was only when she looked again and noticed the bandages, that her uncertainty was dispelled (Tr. 57). Appellant believes this is no different from requiring a suspect to appear in a lineup in which all of the others in the lineup are in any significant respect different -- either in height, or complexion, or clothing, or other characteristics. Such practice has been widely condemned.

The bandages take on additional significance when it is considered that Mrs. Louise Smith, at trial, was in

fact unable to identify Greenwood, and stated "...he looks different, if that's him..." (Tr. 55) (see "Identification of Greenwood at Trial", at pp. 31-32 in this Brief).

In short, the bandages on the facts, as to Greenwood, rendered the lineup fundamentally unfair.

Second: Although the testimony is conflicting, appellant believes that the great weight of competent evidence establishes that mother and daughter made their identifications one in the presence of the other.

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Feldman*

In this connection, reference is made to Detective Holden's testimony at trial that he instructed Mrs. Smith that "if she did see the men to walk up and point them out to me." (Tr. 131). Further reference is made to the testimony of all other witnesses (Officer Bryant, Mrs. Smith, Linda Smith, and Attorney Feldman) that Mrs. Smith and Linda Smith entered the roll call room together and were inside the room when each made her identification. If the testimony is true, it necessarily follows that the complaining witnesses at the least could have known, by observing, who was identified by the other.

The testimony of Officers Holden and Bryant concerning the lineup was plainly inconsistent, at times evasive, and interested. Detective Holden testified definitely at trial that the women were not in the room together (Tr. 134). On remand he testified that he wasn't sure. But Officer Bryant and all other

witnesses testified definitely that Mrs. Smith and Linda were in the room together.

Officer Bryant testified concerning the lineup that although the women were in the same room, they had no opportunity to talk (Tr. Rem. 146). Yet, as previously shown, Officer Bryant's testimony is open to serious question as to its reliability.<sup>1</sup>

The testimony of Mrs. Smith and Linda Smith on remand was that they did not discuss their identifications at the time of lineup. Yet the testimony of Mrs. Smith and Linda Smith was in conflict as to other aspects of the lineup.<sup>2</sup> Further, there was evidence their testimony with respect to the lineup may have been "schooled".<sup>3</sup>

The only disinterested testimony concerning the lineup was that of Attorney Feldman. His testimony was consistent, definite and entirely believable. He had no reason to testify falsely (in fact, he testified on remand that in his judgment the lineup proceeding "had been a just and fair proceeding" (Tr. Rem. 88).<sup>4</sup>

<sup>1</sup>See footnote at p. 51.

<sup>2</sup>e.g., with regard to whether they had discussed the descriptions previously; and with regard to where they were seated. See "Testimony of Complaining Witnesses" at pp. 23-26, supra.

<sup>3</sup>See footnote at p. 25.

<sup>4</sup>Of course, Mr. Feldman was not informed as to the prior descriptions of the accused. His conclusion must necessarily relate to the objective facts of the lineup, taken as a whole, and must be interpreted in light of the information he was given and the purpose he conceived for his presence -- "to see that the lineup would be objectively fair."



Attorney Feldman testified in detail that it was his recollection that Louise Smith and Linda Smith entered the roll call room together (Tr. Rem. 75); that they identified Brown and Greenwood one in the presence of the other; and that he observed Mrs. Smith and her daughter talking in the back of the room (Tr. Rem. 82, 95). Attorney Feldman's testimony is supported by his contemporaneous notes made at the time of the lineup (defendant's exhibits nos. 1 and 2).

Appellant contends that, in these circumstances, there was insufficient evidence for the District Court to find that the police lineup proceedings were proper and not suggestive, and that the evidence as a whole, requires a finding as a matter of law that the lineup was suggestive and constituted a denial to appellant of due process of law.

IV. GREENWOOD WAS INDICTED ON TWO COUNTS OF RAPE (BASED UPON ALLEGATIONS OF THE COMPLAINING WITNESSES THAT HE HAD AIDED AND ABETTED ANOTHER (BROWN) IN THE COMMISSION OF RAPE. WITH RESPECT TO THESE TWO COUNTS, THE EVIDENCE INTRODUCED AT TRIAL SHOWED EITHER THAT GREENWOOD HAD AIDED AND ABETTED BROWN IN THE COMMISSION OF RAPE, OR THAT HE WAS INNOCENT OF THIS OFFENSE. THERE WAS NO EVIDENCE TO SUPPORT EITHER A FINDING THAT BROWN HAD NOT COMMITTED RAPE OR THAT GREENWOOD HAD COMMITTED ANY OFFENSE UNDER THESE COUNTS EXCEPT WITH REFERENCE TO HAVING AIDED AND ABETTED BROWN. THEREFORE, THE COURT SHOULD NOT HAVE PERMITTED APPELLANT'S RIGHT TO ACQUITTAL UNDER THESE COUNTS TO BE COMPROMISED BY THE SUBMISSION TO THE JURY OF THE LESSER INCLUDED OFFENSE OF ASSAULT WITH INTENT TO COMMIT RAPE.

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[Appellant desires the Court to read, in connection with this Argument, the trial court's instructions to the jury, commencing at page 182 of the trial transcript, and particularly the instructions given following the jury's return of a verdict of not guilty on Count One, pages 200-230 of the trial transcript.]

- A. The lesser included offense could properly be submitted to the jury only if there was evidence upon which a jury could find that such lesser offense had been committed.

Rule 31(c), Federal Rules of Criminal Procedure, permits the submission to the jury of offenses "necessarily included in the offense charged." It is generally said that an offense is "necessarily included" if "it is impossible to commit the greater without first having committed the lesser." Giles v. United States, 144 F.2d 860 (9th Cir., 1944). Clearly assault with intent to commit rape is a lesser included offense in a charge of rape. Johnson v. United States, 122 U.S. App. D.C. 1 350 F.2d 784 (1965). Yet despite the apparent permissiveness of Rule 31(c), in a long line of cases, it has been held error to submit a lesser included offense to the jury if there is no evidence in the record to support a jury finding that only the lesser included offense was committed. Thus, in Sparf v. United States, 156 U.S. 51, 15 S. Ct. 273 (1895), the Supreme Court stated that in a trial upon a charge for murder, it would have been erroneous to submit the lesser included offense of manslaughter, when there was no evidence negating the evidence of malice:

"Upon a careful scrutiny of the evidence we cannot find any ground whatever upon which the jury could properly have reached the conclusion that the defendant Hansen was only guilty of an offense included in the one charged, or of a mere attempt to commit the offense charged. A verdict of guilty of an offense less than the one charged would have been in flagrant disregard of all the proof, and in violation by the jury of their obligation to render a true verdict." 15 S. Ct. at 294.

See also Sansone v. United States, 380 U.S. 345, 85 S. Ct. 1004 (1965) in which the Supreme Court stated as follows:

"...But a lesser offense charge is not proper where, on the evidence presented, the factual issues to be resolved by the jury are the same as to both the lesser and greater offenses." Berra v. United States, 351 U.S. 131, 76 Sup. Ct. 685 (1956); Sparf v. United States, 156 U.S. 51, 63-64, 15 Sup. Ct. 273, 277-278 (1895).

And in MacIllrath v. United States, 188 F.2d 1009 (1951), in finding no error in the failure of the trial court to instruct as to a lesser included offense, this Court stated:

"The rule [Rule 31(c), Federal Rules of Criminal Procedure] does not in terms require the instruction. If there is no evidence to justify a verdict of simple assault, a jury should not be so instructed." Burcham v. United States, 82 U.S. App. D.C. 283, 163 F.2d, 761 (1947). To do so would only tend to confuse and mislead the jury."

*Here Greenwood assaulted. He may have intended rape then changed his mind.*

And in Coleman v. United States, 295 F.2d 555, 560 (1961), this Court stated as follows:

"On such evidence [linking a killing to the commission of robbery] without more, the trial court did not err in failing to instruct that the jury might return a second degree murder verdict\*. Indeed the judge would have erred had he so charged\*, a proposition long since and firmly established by the Supreme Court in Sparf v. United States, 156 U.S. 51, 103, 15 Sup. Ct. 273, 293 (1895).

- B. The evidence in the case of Greenwood does not permit submission of the lesser included offense.

The testimony with regard to the offense on August 7, 1967 is set forth at pp. 34-39, to which reference is made.

It is undisputed that Brown had intercourse at gun point first with Mrs. Louise Smith, and subsequently with her daughter Linda Smith.

\*Footnote omitted.

It is further undisputed that Greenwood never held Mrs. Smith in any way, never hurt her, and did not hurt her daughter Linda (Tr. 86, 87).

There was no evidence that Greenwood intended to have intercourse with either Mrs. Smith or Linda Smith against their will. In this connection, Mrs. Smith testified that in the course of her conversation with Greenwood, Greenwood gave her his gun (Tr. 66), and made statements that he did not want to do what Brown was doing. Linda also testified that Greenwood did not want to "do that" [have intercourse], and that Greenwood had stated that "he was only helping his brother." (Tr. 104).

It cannot be doubted, based on the testimony adduced at trial in respect to the counts charging rape, that Greenwood either aided and abetted Brown or that he was innocent under these Counts.

As this Court has stated in Hammond v. United States, 127 F.2d 752 (1942):

"In order to make out a case of assault with intent to commit rape, it is essential that the evidence should show beyond a reasonable doubt: (1) an assault; (2) an intent to have carnal knowledge of the female; and (3) a purpose to carry into effect this intent with force and against the consent of the female."

The Court quoted with approval from Wharton's Criminal Law, Vol. 1, 12th ed. §748, as follows:

"The assault must be such as to show a purpose to have sexual intercourse despite resistance, and the consent of the female must be wanting. The intent of the accused is an essential element in the offense, but of itself is not sufficient; there must be some overt act

in addition to the intent, because for a man to be guilty of a crime of an attempt to commit rape, he must not only have intent to use the force necessary to accomplish his purpose, . . . he must in addition to this, have done some act which, in connection with the intent, constituted the attempt. . . . There must be an intent to use such force and violence as may be necessary to overcome resistance."

Viewing the evidence in the light most favorable to the Government, at best the Government established an intent on the part of Greenwood to have intercourse if consent were forthcoming. (See transcript pages 104, 107). Clearly, the Government failed to establish the intent of Greenwood to carry out the offense with force under the standards of Hammond, supra and Baber v. United States, 324 F.2d, 390 (D.C. Cir., 1963).\*

- C. Appellant was prejudiced by the submission of the lesser included offense of which he was found guilty.

The trial court was bound to follow the salutary rule laid down by this Court in Green v. United States, 95 U.S. App. D.C. 45, 218 F.2d 856 (1955) in which this Court held that there was prejudicial and reversible error where the jury convicted Green of a lesser offense when there was no evidence to support such jury finding. In Green, the accused was convicted of arson and second degree murder. The Court reversed on the ground there was no evidence in the record to support a conviction of this offense, and

\*In Baber as in Hammond, this Court reversed convictions for assault with intent to commit rape because the Government had failed to prove "a purpose to carry into effect this intent with force and against the consent of the female." The evidence of intent to use force was far more significant in Hammond and Baber than in Greenwood.



that either the accused was guilty of first degree murder (i.e., felony murder) or he was innocent. The Court found reversible error in permitting the jury to compromise the accused's possible acquittal on the charge of first degree murder. →

The rule in Green was followed in Coleman v. United States, 295 F.2d 555 (1961), and is still the accepted law of this jurisdiction.

In Tansimore v. United States, 317 F.2d 899 (1962), involving a contention similar to that of Greenwood, this Court distinguished Green for the following reasons: (1) there was no request for the lesser included offense instructions in Green, whereas the instructions had apparently been requested in Tansimore; and (2) in Green the record reflected no evidence which would establish the elements of the lesser offense without proving the greater, whereas in Tansimore the evidence tended to prove a series of events, part of which if believed would establish the lesser offense but not the greater.

It can be seen that in the case of Greenwood neither of the reasons for distinguishing Green are applicable. First, Greenwood not only did not request the lesser included offense instruction, but following the return of the jury's verdict of not guilty on Count One, Greenwood objected vigorously to the giving of the lesser included offense instruction, for the very reason her~~e~~ asserted: to wit, that by having acquitted Greenwood of rape the jury must necessarily have found that Greenwood had not aided and abetted Brown,

and there was no evidence to support Greenwood's conviction of the lesser included offense on any other basis. Second, in the case of Greenwood as in Green, the record reflects no evidence which would establish the elements of the lesser offense without also proving the greater: i.e., either Greenwood aided and abetted in the commission of rape, or he was innocent.

Upon the authority of Green, supra, appellant therefore demands that his conviction be reversed and that he be granted a new trial.

V. IN A TRIAL UPON AN INDICTMENT FOR RAPE, THE TRIAL COURT'S REPEATED INSTRUCTIONS ON THE LESSER INCLUDED OFFENSE OF ASSAULT WITH INTENT TO COMMIT RAPE, SO UNBALANCED THE INSTRUCTIONS AND SO EMPHASIZED THE POSSIBILITY OF THE DEFENDANT'S CONVICTION OF THIS LESSER OFFENSE, AS TO CONSTITUTE REVERSIBLE ERROR.

[In connection with this Argument, appellant desires the Court to read pp. 39-46 of this Brief ("Motions; Instructions to the Jury; Jury Verdict"), and the Court's instructions to the jury at pp. 182-232 of the trial transcript.]

As more fully set forth in the Statement of Facts, to which reference is made, the Court instructed the jury a total of four times with respect to the possibility that Greenwood might be found guilty of the lesser included offense of Assault With Intent To Commit Rape (under Counts One and Three of the indictment charging Rape).

The first time was in the Court's original instructions, and at the request of the Government (Tr. 164). No objection to the instruction was stated at this time by the defendant.

The second time was after the jury returned a verdict of not guilty on Count One (Tr. 200) and after it appeared the jury had failed to consider the instruction (Tr. 200). At this time counsel for Greenwood objected to any further instructions, on the ground the jury had been fully instructed and both counsel had stated they were satisfied. (Tr. 202, 203). The Court overruled counsel's objections, and repeated the lesser included offense instruction as previously given. No further instructions were given (e.g., with regard to the requirement for corroboration, with regard to reasonable doubt, or with regard to any other instructions previously given). Nor did the Court instruct the jury to bear in mind its previous instructions.

The third time the instruction was given was on the following day (the jury having been excused the previous evening when it appeared it still did not understand the instructions), after receipt by the Court of two notes, one requesting a written definition of the lesser included offense, the other requesting an instruction as to "the guilt of an accomplice to the crime." The Court informed the jury it could not give the written instruction, stating "All I can do is read it to you again, so listen very carefully." (Tr. 218). The Court then instructed the jury that all of the previous instructions should be borne in mind, and read to the jury once more a definition of the lesser included offense. The Court followed this instruction with instructions concerning corroboration, the corpus delicti, and aiding and abetting. The Court

failed however to give instructions concerning the distinction between general intent and specific intent; the meaning of reasonable doubt; the significance of the defendant's failure to testify; and other instructions previously given. It is appellant's contention that this failure significantly "unbalanced" the instructions. The jury clearly would tend to concentrate on the instructions it had just received; and there was significant risk that the previous instructions (given the previous day) were not equally considered.

The fourth time the Court instructed the jury that it might find the defendant guilty of the lesser offense, was in response to yet another note from the jury reading: "Does the aiding and abetting clause apply equally to having carnal knowledge and intent to rape?" (Tr. 225), to which question the Court stated "The answer is yes." *How? see note on p. 72, supra*

Apart from appellant's objection to the instruction as an incorrect statement of law (see Argument VI, infra), it is his contention that in these circumstances, by mere repetition (the lesser offense having been referred to four times), the Court gave undue prominence to one aspect of the case: namely, that Greenwood could be convicted of the lesser included offense of assault with intent to commit rape. As stated in a learned treatise on the subject:

"It is error to give and proper to refuse instructions which unduly emphasize issues, theories, defenses, particular evidence, specific or assumed facts, or burden of proof, whether by repetition or by singling them out

and making them unduly prominent . . . although the instruction may be correct as a legal proposition." 88 CJS 2d TRIAL §340.

In the case of Palmer v. Miller, 145 F.2d. 926 (1945), the Court of Appeals for the Eighth Circuit reversed a jury finding for the defendant in a personal injury action, when in response to a single question from the jury, the Court repeated a precautionary instruction previously given, and failed to re-instruct the jury as to other aspects of the case. The Court stated:

"The vice of repeating, without qualification or explanation, the precautionary instruction, in answer to the inquiry of the jury, was that the instruction minimized if it did not totally destroy, the probative value of the most important circumstances tending to show that the defendant had [been negligent]."

The Court concluded that in view of the jury's question, it was prejudicial error to repeat the precautionary instruction, and reversed and remanded for a new trial.

It appears to appellant that the degree of emphasis in his case, by reason of the Court's repeated instructions, far exceeds in prejudicial effect the repeated instruction in Palmer v. Miller, supra. Appellant's conviction therefore should be reversed and the case remanded for a new trial.



VI. THE COURT'S RESPONSE TO THE JURY'S QUESTION: "DOES THE AIDING AND ABETTING CLAUSE APPLY EQUALLY TO HAVING CARNAL KNOWLEDGE AND INTENT TO RAPE?" WAS AN INCORRECT STATEMENT OF THE LAW AND IN THE CIRCUMSTANCES RAISED A SUBSTANTIAL POSSIBILITY THAT THE JURY WAS MISLED.

[In connection with this argument, appellant desires the Court to read pages 39 to 46 of this Brief. ("Motions, Instructions to the Jury; Jury Verdict"), and pages 225 to 231 of the trial transcript.]

In response to the question "Does the aiding and abetting clause apply equally to having carnal knowledge and intent to rape?" (Tr. 225), the Court instructed the jury as follows:

"Ladies and gentlemen of the jury, you have sent out a question asking: 'Does the aiding and abetting clause apply equally to having carnal knowledge and intent to rape?' The answer is yes. Now bear in mind all of the other instructions completely that the Court has given you, and come back with the answers to the various and sundry points, please, if you are able to do so."

Counsel for Greenwood moved for a mistrial (Tr. 226) pointing out to the Court that the question "is totally unintelligible" (Tr. 227). Counsel further pointed out that the question could not be answered merely "Yes," but that if the Court intended to answer the question, the Court would have to give other instructions as well (Tr. 227).

Counsel for the Government also suggested that the question would call for further comment from the Court (Tr. 228, 229).

Despite the suggestions of both sides that further instructions were necessary, the Court persisted in its determination to answer the question "Yes."

Appellant contends that since there is no such crime as "intent to rape," appellant may have been found guilty of the lesser included offense of assault with intent to commit rape, based only upon having "aided and abetted" Brown's "intent to rape." However, as set forth in Hammond v. United States, supra, the offense of assault with intent to commit rape involves three elements, to wit: (1) an assault; (2) an intent to have carnal knowledge; and (3) a purpose to carry into effect this intent with force and against the consent of the female. Clearly, a finding that Greenwood "aided and abetted" only in respect to Brown's "intent to rape" without a finding that he "aided and abetted" in respect to the two other elements (insofar as Brown is the actor), cannot convict Greenwood of the offense for which he was convicted.

Appellant contends that pursuant to the Court's instructions, he may have been convicted only of aiding and abetting Brown's "intent to rape" -- not a crime. Accordingly, he is entitled to a new trial.

VII. GREENWOOD WAS DENIED THE RIGHT TO A SPEEDY TRIAL UNDER  
THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

[In connection with this argument appellant desires the Court to read pages 5 to 9 of this Brief ("Arrest; arraignment; proceedings before trial").]

In summary, appellant was arrested on September 12, 1967; charged on September 13, 1967 with an offense that occurred on August 7, 1967; indicted for this offense on November 15, 1967; and brought to trial on January 10, 1969. Thus, there was a delay of about 16 months from the time of arrest to the time of trial; a delay of about 17 months from the time of the offense to the time of trial; and a delay of about 14 months from the time of indictment to the time of trial. Appellant was incarcerated for about 11 months of the 16 months between arrest and trial.

A motion to dismiss the indictment for lack of speedy trial was first made on August 29, 1968 (about one (1) year after appellant's arrest). It was renewed just before the trial on January 10, 1969, and again at the conclusion of the evidence on January 13, 1969. Some prejudice was shown, in that trial counsel alleged that the delay resulted in the unavailability of a witness, Jon Feldman, to testify (see Tr. 154, 155, 156).\*

\*No subpoena was sought for Mr. Feldman's attendance at trial. Trial counsel explained that he had been "surprised" by Detective Holden's testimony that Mrs. Smith and Linda Smith were not in the same room at the time of the lineup identifications, having apparently known that Mr. Feldman's notes indicated to the contrary. Of course, Mr. Feldman did testify on remand, but by this time the matter had been concluded, and the jury was denied the benefit of Mr. Feldman's testimony.

A delay which is unreasonable and long is by its nature prejudicial. This is the basic assumption of the Sixth Amendment.

See Hedgepeth v. United States, 364 F.2d 684 (D.C. Cir. 1966):

"It is not generally necessary for the defendant to demonstrate affirmatively how he has been prejudiced by an unreasonable delay."  
364 F.2d at 687, n.3.

"The longer the time between arrest and trial, the heavier the burden of the Government in arguing the right to a speedy trial has not been abridged."  
364 F.2d at 687.

The burden is on the Government to bring a case to trial, and to establish that appellant's rights to a speedy trial have not been abridged. McNeill v. United States, U.S. App. D.C. No. 21570, published at 96 Wash. Law Rept. 1177 (decided June 4, 1968).

In finding that the rights of the accused to a speedy trial had been violated, this Court stated in McNeill:

"We conclude that the delay was the result of either gross negligence or a callous indifference to the requirement of speedy trial, despite the fact that the burden is on the Government, not the defense, to bring a case to trial. The record clearly establishes that the Government has not borne its burden of establishing that the appellant's right to a speedy trial has not been abridged." (emphasis added)

The Government has sought to justify the delay because certain questions had been raised concerning the competency of a co-defendant, William Brown. However, by letter dated April 17, 1968, filed in the District Court on April 23, 1968, Saint Elizabeth's Hospital advised the Court that Brown was mentally competent for trial (see docket in Criminal Case No. 1440-67).

Certainly delay beyond April 23, 1968 is therefore not justified for this reason.

The Government has further sought to justify the delay to await the outcome of proceedings involving Greenwood in another case [Criminal No. 1443-67].\* However, the other case has absolutely nothing to do with this case. Any reference to such other case to justify delay is therefore completely misplaced. The other case is simply irrelevant in this regard.

The Government has further sought to justify the delay because the charges against co-defendant Brown were severed [on September 13, 1968]. Appellant fails to perceive the relevance of Brown's criminal responsibility or lack of criminal responsibility with regard to the charges pending against Greenwood, either before or after severance. In any event, certainly after severance on September 13, 1968, no delay against Greenwood can be justified to await the outcome of proceedings against Brown.

Finally, the Government refers to various continuances sought between the time the case was first set for trial (September 9, 1968) and the time of trial on January 10, 1969. At least three (3) such continuances were requested by the Government (Tr. 6,7); the record shows only one continuance requested by the defendant (Tr. 10). It appears additional continuances must have been sought

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\*This is the proceeding involving the assault in the playground upon Geraldine Gaines and Yvette Belt, occurring on the night of September 12, 1967 -- some five weeks after the offense involved in this case. The indictment as to Greenwood was dismissed on October 17, 1968 following the Government's opening statement, on motion of Greenwood's counsel.



(the record is not clear by whom) since the trial of this case was set at least six (6) times on dates certain.

While the delays after September of 1969 have been partially explained by conflicting schedules, etc., appellant contends that, the trial having been delayed already for one year, the Government was required to make special efforts to seek a prompt trial thereafter. Certainly the continuances sought for convenience after September of 1968 cannot justify a delay of an additional four (4) months. As stated in Hedgepeth, supra:

"The passing of such a considerable length of time, no matter who is 'at fault,' should act as a spur on the Government to seek prompt trial. If the Government is lax in this regard, it is appropriate to take the earlier period into account in determining whether there has been a denial to the right of a speedy trial."

As in the case of McNeill, supra, appellant contends that in these circumstances the delay was "the result of either gross negligence or a callous indifference by the Government to the requirement of a speedy trial." He requests that this Court find that the reasons advanced by the Government for the delay of 16 months are insufficient as a matter of law, and that accordingly the case be reversed and remanded with instructions to dismiss the indictment against him.

VIII. THE REVOCATION OF APPELLANT'S PROBATION AND HIS SENTENCING TO IMPRISONMENT FOR A PERIOD OF FROM ONE TO THREE YEARS, WAS IMPROPER IN THAT APPELLANT WAS NOT REPRESENTED BY COUNSEL FOR THE PURPOSE OF THE REVOCATION HEARING.

[In connection with this argument, appellant desires the Court to read the transcript of the hearing on February 28, 1969 at which

Greenwood was sentenced, and pages 10 to 12 in this Brief ("Proceedings in Criminal Case No. 298-66").]

Greenwood had no counsel specially representing him at the revocation hearing in which his probation was revoked in Criminal Case No. 298-66.

Although Greenwood's counsel in Criminal Case No. 1440-67, Samuel L'Hommedieu, Esq., was present at this hearing (for the purpose only of representing Greenwood in connection with his sentencing in Criminal Case No. 1440-67), there was no attorney present to represent Greenwood specifically on the probation revocation. It appears from the record that Mr. L'Hommedieu made no attempt to offer Greenwood any counsel regarding his probation difficulties. Mr. L'Hommedieu has stated he made no such attempt because he was not familiar with the proceedings in Criminal Case No. 298-66, and was not representing Greenwood in that proceeding.

Mr. L'Hommedieu has further stated that (according to his best recollection) he received no notice of any revocation hearing, and that he became aware that the Court would conduct a revocation hearing only at the time of sentencing in Criminal Case No. 1440-67 on February 28, 1969.

No objection was stated to the revocation action, and it appears the District Court was proceeding under the impression either that Mr. L'Hommedieu was Greenwood's attorney on the probation revocation matter as well; or that another attorney was present for this purpose; or that it didn't make any difference in that no

assistance could be rendered beyond the assistance rendered by Mr. L'Hommedieu with respect to sentencing in Criminal Case No. 1440-67. In any event, no inquiry was made of Greenwood or Mr. L'Hommedieu.

The "hearing" that Greenwood received in respect to the revocation of probation consisted of no more than the following remarks of the sentencing judge:

THE COURT: "The Court recalls that Mr. Greenwood was given a fine opportunity, he having been placed on probation for a period of five years for a previous offense, which he did not live up to.

"Do you have anything to say Mr. Greenwood, before the Court imposes sentence?

THE  
DEFENDANT: "No, Ma'am."

THE COURT: "We have a violation of probation to take care of. In probation number 21098 the Court revokes probation and sentences you, Benjamin O. Greenwood, III, to a period of not less than one nor more than three years in a penal institution to be designated by the Attorney General or his authorized representative on that case."

Appellant does not definitely know whether he was prejudiced or not by the failure of his counsel in Criminal Case No. 298-66 to appear at the revocation hearing, because he does not know upon what information the trial judge acted with regard to sentencing, and specifically with regard to sentencing in Criminal Case No. 298-66.\* Appellant further contends that in light of the strict

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\*Appellant's undersigned counsel attempted to obtain appellant's pre-sentence report by motion filed on August 7, 1969 in the District Court. United States District Judge June L. Green denied the motion from the bench on August 29, 1969.

requirement that an accused shall have the assistance of counsel at a probation revocation hearing, appellant should not be put to the burden of showing prejudice, but only to the burden of showing he did not in fact have the assistance of counsel.

It is clear from Mempa v. Rhay, 389 U.S. 128, 88 S. Ct. 254 (1967) that an accused must have assistance of counsel at a revocation hearing, failing which the revocation proceeding is invalid. It further cannot be doubted that assistance of counsel means effective assistance of counsel, and that in order to render effective assistance, counsel must have notice and an opportunity to know the relevant facts and circumstances concerning the proceeding. It is clear Mr. L'Hommédieu had no such opportunity, for he did not represent Greenwood in Criminal Case No. 298-66 and he was not familiar with the proceedings in that case.

Although the burden to show lack of prejudice is on the Government, appellant suggests two areas in which he may indeed have been prejudiced by the failure of his counsel in Criminal Case No. 298-66 to appear. The first is suggested by Justice Jackson's statement in Townsend v. Burke, 334 U.S. 736, 68 S. Ct. 1252, quoted with approval by the Court in Mempa v. Rhay, supra:

"In this case counsel might not have changed the sentence but he could have taken steps to see that the conviction and sentence were not predicated on mis-information or mis-reading of Court records, a requirement of fair play which absence of counsel withheld from this prisoner." 334 U.S. at 741, 68 S. Ct. at 1255.

By the same token, Greenwood's counsel in Criminal Case No. 298-66, had he been present, might have brought to the Court's attention mitigating circumstances in respect to the earlier crime for which Greenwood was put on probation. Mr. L'Hommedieu clearly was not in a position to do so.

Additionally, the Court in Mempa v. Rhay, supra, points out that certain legal rights may be lost if not exercised at the time of revocation of probation (e.g., the possibility of withdrawing a guilty plea). Although Rule 32(d), Federal Rules of Criminal Procedure, does not permit the withdrawal of a guilty plea after imposition of sentence is suspended, nevertheless, an exception is provided "to correct manifest injustice," and the possibility that Greenwood might have withdrawn his plea upon such a basis therefore may not be disregarded. Again, only Greenwood's original counsel in Criminal Case No. 298-66 was in a position to advise Greenwood in this regard. Mr. L'Hommedieu was not in a position to do so.

Finally, it is pointed out that the Supreme Court itself in Mempa v. Rhay, supra, contemplated that the accused's original counsel would represent an accused at a revocation proceeding, stating as follows:

"We assume that counsel appointed for the purpose of the trial or guilty plea would not be unduly burdened by being requested to follow through at the deferred sentencing stage of the proceedings."  
389 U.S. at 137.

For these reasons, the trial court's revocation action must be vacated.



IX. THE SOLE BASIS FOR THE REVOCATION OF APPELLANT'S PROBATION WAS APPELLANT'S CONVICTION IN CRIMINAL CASE NO. 1440-67. IF APPELLANT'S CONVICTION IN CRIMINAL CASE NO. 1440-67 IS REVERSED, NO BASIS FOR THE REVOCATION OF PROBATION WILL EXIST, AND THE REVOCATION AND SENTENCING MUST BE VACATED.

[Appellant desires the Court to read, in connection with this argument, pages 10 to 12 of Appellant's Brief ("Proceedings in Criminal Case No. 298-66").]

Greenwood was apprised by his Probation Officer, John R. Fersinger, that he had violated the conditions of his probation in that "on January 14, 1969 probationer was found guilty of assault with intent to commit rape (two counts) and assault with a dangerous weapon (two counts) after trial before Judge June L. Green in Criminal Case No. 1440-67," and was further apprised that he "[would] be given an early hearing before the Court on this charge of violating [his] probation." See Addendum, p. A-25.

Since no other basis appears in the record for the revocation of appellant's probation (the Court stated no reason for its action, and the only reason appearing at the hearing is the implied one of conviction in Criminal Case No. 1440-67), it must be concluded that this action was taken only in light of appellant's conviction in Criminal Case No. 1440-67, and for no other reason.

Clearly, if appellant's conviction is reversed, there will no longer exist any support in the record for appellant's continued incarceration pursuant to the revocation of his probation.

As stated in a treatise on the subject:

"Where the sole basis for a revocation of a probation order is a subsequent conviction of a criminal offense and the latter conviction is reversed on appeal, the revocation order should be vacated." 21 Am. Jur. 2d CRIMINAL LAW §568, citing State v. Guffey, 253 N.C. 43, 116 SE2d. 148.

It follows the revocation action of the District Court must be vacated, if appellant's conviction in Criminal Case No. 1440-67 is reversed on appeal.

#### CONCLUSION

For the reasons set forth in appellant's Arguments I, II, and III, this Court should reverse appellant's conviction as to all counts and remand for a new trial.

For the reasons set forth in appellant's Arguments IV, V, and VI, this Court should reverse as to all counts and remand for a new trial, or in the alternative, reverse as to Counts One and Three with directions to enter judgment of acquittal, and remand for re-sentencing as to Counts Two and Four.

For the reasons set forth in appellant's Argument VII, this Court should reverse as to all counts and remand with instructions to dismiss the indictment.

For the reasons set forth in appellant's Arguments VIII and IX, this Court should vacate the revocation of appellant's probation and the sentence imposed in Criminal Case No. 298-66.

---

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Washington, D. C. 20006  
Telephone: 298-6350

ADDENDUM

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STATUTES, RULES, AND REGULATIONS INVOLVED

22 District of Columbia Code §2801;  
Rape; Definition and penalty:

"Whoever has carnal knowledge of a female forcibly and against her will, or carnally knows and abuses a female child under sixteen years of age, shall be imprisoned for not more than thirty years: Provided, That in any case of rape the jury may add to their verdict, if it be guilty, the words 'with the death penalty,' in which case the punishment shall be death by electrocution: Provided further, That if the jury fail to agree as to the punishment the verdict of guilty shall be received and the punishment shall be imprisonment as provided in this section."

22 District of Columbia Code §501;  
Assault with intent to kill, rob, rape, or poison:

"Every person convicted of any assault with intent to kill or to commit rape, or to commit robbery, or mingling poison with food, drink, or medicine with intent to kill, or wilfully poisoning any well, spring, or cistern of water, shall be sentenced to imprisonment for not less than two years or more than fifteen years."

22 District of Columbia Code §502;  
Assault with intent to commit mayhem or with dangerous weapon:

"Every person convicted of an assault with intent to commit mayhem, or of an assault with a dangerous weapon, shall be sentenced to imprisonment for not more than ten years."

22 District of Columbia Code §105;

Persons advising, inciting, or conniving at criminal offense to be charged as principals:

"In prosecutions for any criminal offense all persons advising, inciting, or conniving at the offense, or aiding or abetting the principal offender, shall be charged as principals and not as accessories, the intent of this section being that as to all accessories before the fact the law heretofore applicable in cases of misdemeanor only shall apply to all crimes, whatever the punishment may be."

Rule 5(a), Federal Rules of Criminal Procedure;  
Appearance Before The Commissioner:

"An officer making an arrest under a warrant issued upon complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith."

Rule 31(c), Federal Rules of Criminal Procedure;  
Conviction of Less Offense:

"The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense."

WASHINGTON, D. C.					11-11-57		2:17-127		
OFFENSE REPORT (TO INCLUDE ATTEMPTS)					X NO.		PCT. NO.		
CHECK ONE <input checked="" type="checkbox"/> ACTIVE <input type="checkbox"/> EXCEPTIONALLY CLEARED <input type="checkbox"/> CLOSED BY OTHER MEANS					DET. BU. SQUAD NO.		OFFENSE OCCURRED <input checked="" type="checkbox"/> PUBLIC <input type="checkbox"/> PRIVATE TYPE OF PROPERTY <input type="checkbox"/> VACANT <input type="checkbox"/> CONDOMINIUM		
ADW (GR)					DATE OF THIS REPORT		9-12-57		
NAME OF FIRM OR COMPLAINANT					HOUSEBREAKING				
Harry Sonny Shaw					KIND OF PREMISES		WHAT APT. WHAT FL.		
FIRM ADDRESS OR HOME ADDRESS					WHERE ENTERED		IF BUSINESS, KIND		
443 32nd St. S. E.									
COMPLAINANT'S OCCUPATION OR BUSINESS					TOOLS USED TO ENTER		HOW ENTERED		
Asst. Custodian Kramer School									
OCCUPATION OR BUSINESS ADDRESS					ROBBERY				
1700 Block Q St. S. E.					KIND OF LOCATION OR PREMISES		METHOD USED		
HOME PHONE NO.					IF BUSINESS, KIND		WEAPON USED		
OFFICE PHONE NO.									
TIME, DATE AND PLACE OF OCCURRENCE					GIVE VICTIMS		SEX		
8:30 PM, 9-12-57, 1700 Block Q St. S. E.							RACE		
TIME AND DATE REPORTED					TRADEMARK OR UNUSUAL EVENT		AGE		
8:35 PM, 9-12-57									
PERSON REPORTING OCCURRENCE TO POLICE									
above complainant									
WITNESSES					ALL OFFENSES AGAINST PERSONS				
NAME		HOME PHONE NO.		HOW INJURED		WEAPON USED		MEANS OR METHOD	
ADDRESS				NONE		pistol		pointing	
NAME		HOME PHONE NO.		GIVE VICTIMS		SEX		RACE	
ADDRESS						Male		Negro	
PERSON ARRESTED					ADDRESS		CASE NO.		
BENJAMIN ORLAND GREENWOOD III					2122 13th St. S.E. front room		728-1		
ST.	RACE	SEX	AGE	HGT.	WGT.	HAIR	EYES	COMPLEXION	BUILD
ACTUAL	M	M	19	6ft.	180	black	brown	med	med
PERSON ARRESTED					ADDRESS		CASE NO.		
ST.	RACE	SEX	AGE	HGT.	WGT.	HAIR	EYES	COMPLEXION	BUILD
ACTUAL									
GIVE ALL OTHER DETAILS OF OFFENSE. GIVE DESCRIPTION OF PROPERTY, BRAND & SERIAL NOS. USE CONTINUATION REPORT IF NECESSARY.									
The above complainant reports above time date and place while on the play ground at the									
Kramer Jr. High school 1700 block of Q St. S. E. a negro male pointed a gun at him.									
Close the above case with the arrest for the above named defendant by Det's BB Bryant									
and JJ Harlow & CC Dean # 11 Pet.									
No recovery of gun and no injuries.									
SIGNED TO					WAS PROPERTY INSURED?				
BRYANT					TOTAL VALUE \$				
NATURE OF REPORTING OFFENSE					SUPERVISORS INITIALS				
UNIT					SIGNATURE OF C. O. OF UNIT REPORTING				
CIN					PAGES				

<b>OFFENSE REPORT (TO INCLUDE ATTEMPTS)</b> W-9		X NO.		PCT. NO. 11-57-23192	
CHECK ONE	ACTIVE	<div style="border: 2px solid black; padding: 5px; font-weight: bold; font-size: 1.2em;">CLOSED</div>	CLEARED BY ARREST	DET. BU. SQUAD NO.	
	EXCEPTIONALLY CLEARED	CLOSED BY OTHER MEANS	DATE OF THIS REPORT 9-12-57		OFFENSE OCCURRED <input checked="" type="checkbox"/> PUBLIC SPACE <input type="checkbox"/> PRIVATE SPACE TYPE OF PROPERTY <input type="checkbox"/> VACANT <input type="checkbox"/> CONDEMNED
OFFENSE <b>ROBBERY (PES)</b>			<b>HOUSEBREAKING</b>		
NAME OF FIRM OR COMPLAINANT Regina Harvey			KIND OF PREMISES	WHAT APT.	WHAT FLOOR
FIRM ADDRESS OR HOME ADDRESS 1424 18th St. S. E.			WHERE ENTERED	IF BUSINESS, KIND	
COMPLAINANT'S OCCUPATION OR BUSINESS Merik S. E. Neighborhood House			TOOLS USED TO ENTER	HOW ENTERED	
OCCUPATION OR BUSINESS ADDRESS 553 Mt. View Pl. S. E.			<b>ROBBERY</b>		
HOME PHONE NO. LU 3-2357		OFFICE PHONE NO. 582-770		KIND OF LOCATION OR PREMISES S. E. St.	METHOD USED PES
TIME, DATE AND PLACE OF OCCURRENCE 1:35 PM, 9-12-57, 1400 blk. 18th St. S. E.			IF BUSINESS, KIND N/A		WEAPON USED PES
TIME AND DATE REPORTED 9-12-57			GIVE VICTIMS	SEX F	RACE N
PERSON REPORTING OCCURRENCE TO POLICE Above complainant			AGE 17		
WITNESSES			TRADEMARK OR UNUSUAL EVENT		
NAME ADDRESS			ALL OFFENSES AGAINST PERSONS		
HOME PHONE NO.			HOW INJURED		
NAME ADDRESS			WEAPON USED		
HOME PHONE NO.			MEANS OR METHOD		
PERSON ARRESTED William (M) Brown			GIVE VICTIMS		
ADDRESS 1133 Chicago Pl. S. E.			SEX		
T. <input checked="" type="checkbox"/> ACTUAL <input type="checkbox"/>	RACE N	SEX M	AGE 21	HGT. 5'11"	WGT. 149
HAIR black		EYES brown		COMPLEXION med	BUILD med
CLOTHING sport clothing		SCARS-TATTOOS			
PERSON ARRESTED			ADDRESS		
T. <input type="checkbox"/> ACTUAL <input type="checkbox"/>			CASE NO.		
RACE			SEX		
AGE			HGT.		
WGT.			HAIR		
EYES			COMPLEXION		
BUILD			CLOTHING		
SCARS-TATTOOS			CASE NO.		
GIVE ALL OTHER DETAILS OF OFFENSE. GIVE DESCRIPTION OF PROPERTY, BRAND & SERIAL NOS. USE CONTINUATION REPORT IF NECESSARY.					
Above complainant reports above time date and place she was approached by a negro male who					
stuck something hard into her back and stated to her "give me your pocket book" the					
complainant replied no and at this time the negro male snatched her black leather pocket					
book and ran east in the 1700 block of Q St. S. E.					
Close the above case with the arrest of the above named defendant by Pvt's W. C. Mickorick					
and W. J. Reilly # 11 Pct.					
No recovery of property. Pocketbook contained \$1.50 in assorted change and personal papers.					
SIGNED TO <i>Regina Harvey</i>			WAS PROPERTY INSURED? NO		
UNIT CID-2			TOTAL VALUE \$1.50		
SUPERVISOR'S INITIALS <i>W. C. Mickorick</i>			SIGNATURE OF C. O. OF UNIT REPORTING <i>W. J. Reilly</i>		
PAGE 1 OF 1			PAGES		



METROPOLITAN POLICE DEPARTMENT  
WASHINGTON, D. C.

T. T. NO.

C. C. R. NO.

217 135

X NO.

PCT. NO.

11-67-13103

OFFENSE REPORT (INCLUDE ATTEMPTS)

ACTIVE

CLEARED BY ARREST

DET. BU. SQUAD NO.

OFFENSE OCCURRED ☐ PUBLIC SPACE ☒ PRIVATE SPACE

CHECK ONE

EXCEPTIONALLY CLEARED

CLOSED BY OTHER MEANS

DATE OF THIS REPORT

9-12-67

TYPE OF PROPERTY ☐ VACANT ☒ OCCUPIED

OFFENSE

ASSAULT WITH INTENT TO RAPE

HOUSEBREAKING

NAME OF FIRM OR COMPLAINANT

Geraldine Gaines

KIND OF PREMISES

WHAT APT.

WHAT FLOOR

FIRM ADDRESS OR HOME ADDRESS

1525 19th St. S.E.

WHERE ENTERED

IF BUSINESS, KIND

COMPLAINANT'S OCCUPATION OR BUSINESS

Student

TOOLS USED TO ENTER

HOW ENTERED

OCCUPATION OR BUSINESS ADDRESS

St. Francis Jr. High, 8th Grade

ROBBERY

HOME PHONE NO.

582 6174

OFFICE PHONE NO.

RE 8-6000

KIND OF LOCATION OR PREMISES

METHOD USED

TIME, DATE AND PLACE OF OCCURRENCE

8:35 P.M., 9-12-67, Kramer School Yard

IF BUSINESS, KIND

WEAPON USED

TIME AND DATE REPORTED

8:45 P.M., 9-12-67

GIVE VICTIMS

SEX

RACE

AGE

PERSON REPORTING OCCURRENCE TO POLICE

C1

TRADEMARK OR UNUSUAL EVENT

WITNESSES

ALL OFFENSES AGAINST PERSONS

NAME

None

HOME PHONE NO.

HOW INJURED

WEAPON USED

MEANS OF INJURY

NAME

HOME PHONE NO.

GIVE VICTIMS

SEX

RACE

AGE

PERSON ARRESTED

LEON BLAGNON

ADDRESS

2586 Fifth Sterling Ave.

CASE NO.

7280

ST. ACTUAL

☒

RACE

SEX

AGE

HGT.

WGT.

HAIR

EYES

COMPLEXION

BUILD

CLOTHING

SCARS

TATTOOS

None

N

M

21

5ft9

125

blk

brn

mod.

slim

white jacket, levis

None

None

None

None

None

None

None

None

None

None

None

None

None

None

None

None

None

None

PERSON ARRESTED

WILLIAM (JIM) BROWN

ADDRESS

1133 Chicago St. S.E.

CASE NO.

7280

ST. ACTUAL

☒

RACE

SEX

AGE

HGT.

WGT.

HAIR

EYES

COMPLEXION

BUILD

CLOTHING

SCARS

TATTOOS

None

N

N

21

5ft11

149

blk

brn

mod

slim

light jacket, levi

None

None

None

None

None

None

None

None

None

None

None

None

None

None

None

None

None

None

VE ALL OTHER DETAILS OF OFFENSE. GIVE DESCRIPTION OF PROPERTY, BRAND & SERIAL NOS. USE CONTINUATION REPORT IF NEEDED

C1, in company with C2 one YVETTE BELT, NEGRO FEMALE, 15 YEARS OLD, A STUDENT AT KRAMER JR. HIGH, reports that at about 8:35 P.M., 9-12-67 while standing on the steps of Kramer Jr. High the above two defendants approached them, produced guns and forced the two complainants into the school yard at Kramer Jr. High. After entering the school yard, Blagmon made the C1 remove her undergarments and attempted to have intercourse with her, defendant Brown made C2 remove her undergarments and attempted to have intercourse with her.

Case closed with the arrest of Blagmon and Brown by Pts. W.C. Maskevich, W.T. Peaty, S.C. Dean, J.C. Campbell, P11 Pct. and Pts. B.B. Bryant, J.J. Henlon, E.T. Lanigan & R.M. Piarce C.I.D.

Recovered from Blagmon was one 25 Pic starter 523332 pistol, listed on Property Book 1028, Page 213. Recovered from Brown was one Stinger starter pistol, listed on Property Book 1028, Page 213.

SIGNED TO

WAS PROPERTY INSURED?

TOTAL VALUE

ONATOR

UNIT

SUPERVISOR'S INITIALS

SIGNATURE OF C. O. OF UNIT REPORTED

REPORTED BY

UNIT

SUPERVISOR'S INITIALS

SIGNATURE OF C. O. OF UNIT REPORTED



Office of the Sex Squad  
Metropolitan Police Department  
Washington, D.C.  
Wednesday, September 13, 1967  
Time: 12:20 A.M.

Re: Alleged Assault with intent to rape  
committed against Geraldine E. Gaines and  
Yvette D. Belt. negro, female, 15 yrs  
Leon Blagmon, negro, male, 21 yrs of 253  
Firth Sterling Ave S.E. and William Brown  
negro, male, 21 yrs of 1133 Chicago Pl.  
occurring about 8:45 P.M., 9-12-67, at  
Kramer Jr. High school playground, 17th  
and Q St. S.E.

STATEMENT OF THE COMPLAINANT, Geraldine E. Gaines n/f/14 years of 1525 19th street  
SE. Washington, D.C. apartment #24. Phone 582-6174 and living there with her mother  
Sadie Gaines n/f/35. Attends St. Francis Xavier Catholic School.

"I was sitting on the steps in front of the Kramer School with Yvette Belt, Deborah,  
and Paing, talking at about 8:30 PM. Two boys came from around the corner and talked  
with the janitor. The shorter one who was wearing a light jacket and dark pants, white  
tennis shoes was getting ready to fight with the janitor. The one with the black shirt  
who was with him told him to come on and go. There was a lady coming down the street  
and they started to shove her around and bumping into her. They were down the street  
so I could not hear what was going on. My girlfriends and I went around to the side  
steps and sat down there. The short one came to where we were sitting with another  
one that was wearing a grey jacket, dark pants, he looked like he was wearing an under  
shirt only under the jacket. He was real skinny. The four of us got up and started  
walking up the path to the front of the school. Paing and Deborah was in the front,  
and I and Yvette were in the back walking up the path. We were a little behind the  
other girls when the one with the grey jacket came up, to us and asked how do you  
get out to the playground. We pointed to the little hole in the fence and told him  
that was how you get in. He said for us to show him and then he pulled a gun and said  
go up there and show it to him. He made Deborah go thru the hole, then me and then  
he came thru. In the playground he made both of us take our clothes off. We both did  
as he told us and we were both standing there naked. Then the one with the light jacket  
came up and he had a gun too. He said if we didn't do what he wanted, he was going to  
shoot us. At about this time the one that was wearing the black shirt came ~~over~~ over  
the fence and said that the police was coming. I was crying and Deborah told me not  
to cry or they would hurt us. They were holding the guns to our heads. The boy in the  
light jacket told the boy in the grey jacket to take me and find another way out.  
I had my clothes in my hand and he had the gun under his jacket and up to my head.  
Before the one in the black shirt came, the one in the light jacket had his pants  
down and was going to have intercourse with me. While we were walking, he saw the  
paddy wagon on the other side of the fence. He made me run around to where the others  
had ~~Yvette~~ Yvette. When I was crying, it was Yvette that told me to stop crying. We  
call Yvette, Deborah sometimes. The janitor opened the fence and the police came in  
and got the three of them.

The one in the light jacket I found out later was Leon Blagmon. The one in the  
grey jacket was William Andrew Brown, and the one in the black shirt is Benjamin  
Greenwood. I identified them in the police station last night and again ~~re-identify~~  
from the pictures here in this office. I am in the 8th grade and can read and  
write and I know what the truth is. I have read this statement and it is true.

signed.....*[Signature]*.....

Witnessed and typed by  
Det. Edward Guggenheim  
Sex Squad, C.I.D.  
Time: 11:30 AM

Office of the Sex Squad  
Metropolitan Police Department  
Washington, D. C.  
Wednesday, September 13, 1967  
TIME: 2:30 p.m.

RE: Assault with Int. to Rape committed  
against Yvette Debra Belt, Negro, female,  
15 yrs. of 1512 19th St. S. E., occurring about  
8:45 p.m. on Tuesday, September 12, 1967 at  
Kramer Jr. High School Playground, 17th &  
Que St. S. E. by William Brown, N/M/ 21 yrs.  
1133 Chicago Street, S. E.

Statement of the complainant, Yvette Debra Belt, Negro, female, 15 yrs. age, born April 29, 1952 in Washington, D. C. to Helen B. Scott and father Paris Scott. At present complainant resides with her mother Helen B. Scott, 1512 19th St. S. E., phone 584-5881. Statement taken in the office of the Sex Squad by Mrs. Helen Daniels.

STATEMENT:

"About 8:30 p.m. on Tuesday, September 12, 1967, I was over by Kramer Jr. High School, and some other girls were with me. They asked me to wait for them while one of them went across the street to get her sister. I waited with Jerry (last name not known). I was sitting on the steps of the School on the 17th Street side. # 3 unk. Negro, males came walking towards us. I said to Jerry lets go. The ~~boys~~ boys said we were not going anywhere. One of the boys asked how to get in the school yard. Jerry told them they could go through the fence. They told us to start walking and they walked behind us and they made us go in the hole in the fence to the school yard. Benjamin Greenwood, N/M/19 told the other boys he would be back. He went around the front way to the front of the school. William Brown N/M/21 told both of us to take off our clothes. Jerry and I said no we would not. He said if you all don't I will shoot you. He said he would shoot us if we called for the police or screamed. Leon Blagman, N/M/21 threw Jerry on the ground. He made her take off her clothes. He got on top of Jerry. He stayed on her for awhile then got up and took her around the other side of the building. William Brown, N/M/21 had a gun at my head and told me to take off my clothes. I just took off my dress and slip. He pulled me down in a window well. Told me to lay down and I would not. He pushed me down. He said I was going to give him some and I said no. He said if I did not give it to him I would not go out alive. He told me to pull down my underwear and got on top of me. He stuck his private half way into me. The police arrived. Greenwood came threw the fence and said the police are coming. He ran to the opposite side where Jerry and Blagman was. The police arrived and told them to put their hands up and Jerry found the gun that was on the ground. The police took Jerry and I to #11 Pct.

I am in the 9th Grade at Kramer Jr. High School and I can read and write and have read the above statement and it is true and correct.

Yvette Debra Belt  
Yvette Debra Belt

Typed by Mrs. Helen Daniels  
Finished 3:00 p.m.

## STATEMENT OF FACTS

PCT. C. NO.

11-57-13193

T. T. NO.

DET. BUREAU  
SQUAD NO.

X NO.

NAME AND RANK OF OFFICER HANDLING CASE IN COURT

Data Holder, Sex Squad, Data Halloran and Bryant #11 Pct.

PRECINCT

CASE NO.

CHARGE

11th

7233

Assault with Intent to Commit Rape

NAME OF DEFENDANT

#1 Leon Blagron

#2 William Andrew Brown

#1 #2 1133 Chicago St SE

SEX

COLOR

AGE

DATE OF BIRTH

Male

Negro

#1 21 #2 21

#1 7-23-16 #2 11-17-15

LOCATION WHERE OFFENSE OCCURRED

DATE AND TIME OF OFFENSE

Pearl Kramer Jr. High School 1700 Q St SE

About 8:35 PM 9-12-67

LOCATION OF ARREST

DATE AND TIME OF ARREST

17th and Q St SE

About 8:35 PM 9-12-67

STATEMENT OF FACTS BY OFFICER (INCLUDE ANY STATEMENT BY DEFENDANT):

Geraldine Gaines, negro female 14 years of 1525 19th St SE reports about 8:35 PM 9-12-67, while standing on the steps of the Kramer Jr High school, with a girl friend, Yvette Balt, negro female 15 years 1512 19th St SE, they were approached by two negro males. Balt, asked one of the boys for a cigarette. They gave her one and continued walking down the street. They then began messing with another lady who was walking in front of them (See CGR 247-435 Pct. 11-57-13193 Robbery PDS, comp. Regina Harvey negro female 17 years of 1424 18th St SE. Closed case.) A short time later two boys later identified as the above defendant and William Brown 11-11-21 years returned to where the girls were sitting. Subject Brown pulled a gun and told the girls to show them how to get into the playground. They led the two boys to the playground, with Brown holding a gun on them, through a hole in the fence. When inside the playground, Blagron told both girls to get undressed. Geraldine then removed all of her clothing, and Yvette removed all but her panties and bra. Blagron took Geraldine to another part of the playground, and was on top of her with his pants half way down and penis exposed when a third subject, later identified as Benjamin O. Greenwood negro male 19 years of 2122 13th St SE jumped over the playground fence and yelled the police are coming. Before the three subjects could leave the playground, they were arrested by several officers.

(THE ABOVE TO BE MADE BY THE OFFICER FROM MEMORANDUM TAKEN AT THE TIME OF INVESTIGATION)

A-11<sup>(OVER)</sup>

# WITNESSES

LIST THE NAME, ADDRESS AND STATEMENT OF EACH WITNESS.

NAME (LAST - FIRST - MIDDLE)	SEX	AGE	ADDRESS	PHONE NO.
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STATEMENT

NAME (LAST - FIRST - MIDDLE)	SEX	AGE	ADDRESS	PHONE NO.
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STATEMENT

NAME (LAST - FIRST - MIDDLE)	SEX	AGE	ADDRESS	PHONE NO.
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STATEMENT

NAME (LAST - FIRST - MIDDLE)	SEX	AGE	ADDRESS	PHONE NO.
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STATEMENT

NAME (LAST - FIRST - MIDDLE)	SEX	AGE	ADDRESS	PHONE NO.
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STATEMENT

FINAL DISPOSITION OF CASE

(THIS STATEMENT MUST BE SIGNED BY THE OFFICER)

PD form 163

back side

C4

*[Signature]*  
Signature



## METROPOLITAN POLICE DEPARTMENT

WASHINGTON D. C.

IDENT. NO.

204842

C. C. R. NO.

247-117

PCT. NO.

11-67-13189

X NO.

DET. BU.  
SQUAD NO.

J

T. T. NO.

This defendant on Probation until 6-29-72!!!!

CR 235871

11-67-11822

STATEMENT FOR LINEUP

NAME BENJAMIN ORWAY GREENWOOD III		COLOR Negro=	AGE 39 YD	SEX Male
ALIAS OR NICKNAME Junior		ADDRESS 2122 13th St. S. E. front room		
ADDRESS OF LOCAL DRAFT BOARD 916 G St. N. W.		NO. OF LOCAL DRAFT BOARD # 15		
SELECTIVE SERVICE NO. 49-15-46-679	BRANCH OF SERVICE None	SERVICE NO. None		
DATE OF INDUCTION None	DATE OF DISCHARGE None	SOCIAL SECURITY NO. 578-58-2029		
PLACE OF BIRTH (CITY & STATE) Washington, D. C.	DATE OF BIRTH 12-11-46	TIME IN D.C. Life		
DATE & TIME OF ARREST 8:45 PM, 9-12-67	LOCATION OF ARREST 1400 Block 17th St. N. W.	PRECINCT CASE NO. 7289- 900 PM		
PRESENT CHARGE GUN (GUN)	ARRESTED BY Det's BB Bryant & JJ Hanlon & Pvt. CC Dean # 11 Pct.			

STATEMENT OF FACTS (INCLUDING METHOD OF OPERATION, PRESENT LOCATION AND PRESENT CONDITION OF ANY INJURED COMPLAINTS)

At about 8:35 PM, 9-12-67 the call for a Robbery (PSS) came out for 1424 8th St. S. E. when the above arresting officers responded to the scene of the above location, a unidentified cab driver told the officers that one of the subjects ran into the Warner Jr. High school; at this time the above officers observed the above defendant running on the grassy ground and he then climbed over the fence and was apprehended on the other side of the fence. On the school play ground the defendant was taken to the 1700 block of Q St. N. W. so as the complainant in the PSS could identify him and at this time MERRY SOMMY SHAW, N-M-32 of 418 32nd St. S. E. pointed out the above defendant as the man who had pulled a gun on him in the above school playground about five minutes before the above defendant was placed under arrest. The complainant in the Robbery PSS could not identify the above defendant. No gun was recovered from the defendant. The complainant in the ADW case Shaw is a custodian at the above school and identified the above man on the scene of the PSS and again at the 11 Pct. The defendant was advised of his rights at the Eleventh Pct. and denied the above offense.

- NO Gun Recovered -

# ANGOUTS, HABITS ETC., OF PRISONER

Claims no hang outs .  
smokes and drinks

## RECORD OF ARRESTS (LOCAL OR F.B.I.)

8-6-67 Brank mollied  
3-17-66 Robbery and UUV Auto 5 years on probation until 6-29-72  
2-8-67 Assault on a Police Officer Mollied  
12-26-65 UUV Auto indicted  
9-15-65 Att. UUV 90 days

## FAMILY and RELATIVES

Relationship	Age	Name	Address
Other	D30	Eurstine Johns Greenwood	D30
Other	45	Benjamin O. Greenwood III	unknown
Other	17	Duellin Greenwood	unknown
Sister	22	Luellin Chambers	unknown
Sister	18	Evon Greenwood	unknown

## FRIENDS and ASSOCIATES

Name	Address
Alfred Holmes	3177 Roberson S. E.
Edna Garrett	4212 3rd. St. N. W.
Shilia Brown	1107 57 Pl/ N. E.

## WORK HISTORY

Date	Employer	Address	Occupation
and on 10 years to 9-12-67	Greenwoods Transfer	822 Howard Rd. S. E.	mover

Det. Patrick T. Lanigan

Signature of officer taking this statement

CID # 1m Pct.

Precinct or unit

Det. Sgt. Richard J. Latona

Signature of reviewing official

A-14

CID # 11 Pct.

Precinct or unit

PD form 111  
back side



OFFENSE REPORT (TO INCLUDE UNFOUNDED, CLEARED BY OTHER MEANS, CLEARED BY OTHER MEANS, CLEARED BY OTHER MEANS)

CHECK ONE: EXCEPTIONAL BY CLEARED, CLEARED BY OTHER MEANS, CLEARED BY OTHER MEANS

X NO. 57-292, 57-292, 57-292

PCT. NO. 11-67-2153

OFFENSE OCCURRED: PUBLIC, PRIVATE, VACANT, CONDEMNED

TYPE OF PROPERTY: HOUSEBREAKING

NAME OF FIRM OR COMPLAINANT: Police Smith, Linda Louise Smith

HOME ADDRESS OR HOME ADDRESS: 106 Ridge Pl., S.E.

COMPLAINANT'S OCCUPATION OR BUSINESS:

OCCUPATION OR BUSINESS ADDRESS:

PHONE NO.: , OFFICE PHONE NO.:

DATE AND PLACE OF OCCURRENCE: 11:45 P.M., 8-7-67, 1700 blk. T St., S.E.

DATE AND DATE REPORTED: 100 A.M., August 8, 1967

PERSON REPORTING OCCURRENCE TO POLICE:

WITNESSES:

ALL OFFENSES AGAINST PERSONS

HOW INJURED: , WEAPON USED: , MEANS OR METHOD:

GIVE VICTIMS: , SEX: Female, RACE: Negro, AGE: 39 & 15

ADDRESS:

SCARS-TATTOOS:

ALL OTHER DETAILS OF OFFENSE: CIVIL DESCRIPTION OF PROPERTY, BRAND & SERIAL NOS. USE CONTINUATION REPORT IF NEEDED

ove complainants report about 11:45 P.M. on 8-7-67 while walking in the 1700 blk. of T St. S.E. they were approached by two negro males, one of whom displayed a gun. This subject told them the other subject also had a gun. The two subjects took the two women to a construction location in the 1700 blk. of T St., S.E. and there while one of the subjects held one of the women at gunpoint, the other subject had intercourse with the woman. When he finished with the first woman, he also had intercourse with the second woman. The second subject did not have intercourse with either woman. The subject that did not have intercourse, stated to the women that the other subject was his brother and that he was out of St. Elizabeth's and was crazy. Subject described as negro male, 29 yrs., thin build, medium brown skin, wearing a white tee shirt and brown pants. Subject described as negro male, 29 yrs., taller than the first man, medium brown skin, wearing a white tee shirt and brown pants. Subject described as negro male, 29 yrs., taller than the first man, medium brown skin, wearing a white tee shirt and brown pants. Subject described as negro male, 29 yrs., taller than the first man, medium brown skin, wearing a white tee shirt and brown pants.

Office of the Sex Unit  
Metropolitan Police Department  
Washington, D.C.  
Thursday, August 10, 1967  
Time: 12:11 P.M.

Re: Rape committed against Louise  
Smith, Negro, female, 39 yrs., com-  
mitted in the 1700 Blk. of T St., S.E.  
by an unknown Negro male on 8-7-67.

Statement of Louise Smith, Negro, female, 39 yrs, Born July 27, 1928 in Durham N.C. to parents Virginia Williams and Albert Mangum. Lives 1406 Ridge Pl., S.E. with Husband and children. Employed at the Church of the Savior as housekeeper. Statement taken by Pvt. Theresa W. Johnson.

STATEMENT:

about 7-16-67  
About 11:45 P.M., on Monday August 7, 1967 as we walked down T Street, we turned on 17th St., and one boy come cross the walk and I thought it was my son until he approached us. He said for us to Stop and I thought he was Kidding. He said he had a gun and he said he had a friend, another fellow and he had a gun. At that time the other fellow came across the street and he told us to turn around and keep walking. He took us thru the alley and my daughter and I kept walking like they said. Then I asked him "What is it that you want?" then I started pleading with them. I asked them if it was money that they wanted. They said no they didn't want money. I asked them where they were taking us and they said right thru here. That was thru the alley and they took us in this building that was under construction. When we got inside I started pleading with them, telling them my age. I told them that I was a 40 yr. old woman and I had 5 small children. They said that they didn't care. This was just this one guy talking. I was pleading not to hurt my daughter and my daughter was pleading not to hurt my mother. It was just the one guy doing all the talking. After we got in the building this one guy that was doing all the talking told the other guy to take my daughter thru some little cut in the building from where I was. And then the guy that was doing all the talking stayed with me and made me take off my shoes and my underclothes. I was standing in the corner then he leaned me back against the wall. He had the gun in one hand and was holding me with the other. He unzipped his pants and took out his penis and had intercourse with me. I don't think he finished because the other guy came over and told him that my daughter wouldn't submit him so this guy stopped having intercourse with me and he told me to stand there and not to move. Then he went over to where my daughter was and left the other fellow over there with me. While this other fellow was with me I was still pleading with him not to let the other fellow hurt my daughter. I kept praying to him. He told me that his brother was sick and had Been to St. E. and that was the only way he could help him was to go out with him to do these things but that he didn't want to do it himself. He said he would be sure that he wouldn't let his brother harm us. This boy didn't even touch me. He went over about three times to see what was happening to my daughter and ne of the time he went over he went on his own the other times I asked him to go. He went on his own because he heard somebody hollering and he thought it was my daughter. He said himself that he better not hurt her. The last time he went over -- I asked him if he was going to keep her there all night and he said that he would get his brother out of there if he had to drag him out himself. So then they just brought us on out as if nothing had happened. They helped us out of the building. We walked away from the building together the four of us. When they left us they said "We'll see you" as if nothing had happened. My daughter and I walked on down the street together and they ran up the street.

Statement of Louise Smith Continued.

Page 2

One of them is kinda tall, real slender, I really don't know his height and I would say he was about my complexion and he had on a short sleeved shirt the shirt was kinda dark I thought was kinda grey. The gun he had was a little short and flat just big enough to hold in his hand it was dark and it had some light color on it. He didn't have on a hat. That's all I know about him. The other fellow wasn't too tall about medium height and he was a little darker than the other one and he had little beard and mustache. His shirt looked a little dark to me, it looked dirty I can't be sure. The tall slender one was the one that had intercourse with me and my daughter. The one with the beard didn't bother us.

The slender one wouldnt let us say nothing and the other kept talking to us. The heavier one let me hold the gun he had. I took the gun but I had some many thoughts it looked real and felt real but I didn't want to take any chances. He could have taken it away from me and hurt me. I felt that if I tried anything the other guy might hurt my daughter.

I can read and write and I have read this and it is true and correct.

Witnessed and typed by:

Louise Smith  
Louise Smith

Pvt. Theresa A. Johnson

Statement completed at 12:44 P.M. 8-10-67.

Office of the Sex Unit  
Metropolitan Police Department  
Washington, D.C.  
Tuesday, August 8, 1967  
Time: 12:20 P.M.

Linda Louise

Re: Rape Committed against Louise  
Linda Smith, Negro, female, 18 yrs.  
committed to the 1700 Blk. of T St.,  
S.E. by a Unknown Negro Male on  
Aug. 7, 1967.

Linda Louise

Statement of Louise-Linda Smith, negro, female, 18 yrs., DOB: Dec. 29, 1948, born in Durham, N.C., to parents Louise Nora Smith and Leroy Smith. Lives at 1406 Ridge Pl., S.E., with parents. Unemployed. Statement taken by Pvt. Theresa W. Johnson.

STATEMENT.

About 11:45 P.M., Monday, August 7, 1967 I was walking down 17th St., S.E. We was on the right side of the Street and they were on the left side. One of them came across the street and pointed a gun at me and said "If you holler I'll shoot, just keep walking". My mother asked him what he wanted and he said "He want to fuck". We started to go back the other way but he pointed the gun at us so we kept walking. He said "Let's go in this alley here", then the other boy came across the street. and the first boy said "He has a gun too". We went on in the alley behind the apartments where they were building a new apartment. So we went in a window part into this half built apartment. The first boy kept my mother over by the window part and the other boy took me over in between another apartment, it was a house. The boy that I was with kept talking me that he didn't want to mess with us, it was his brother that wanted to mess with us. He said that his brother was crazy and just came from St. Elizabeth's. I told him if he didn't want to mess with us, why didn't he go get his brother and hold him so me and my mother could leave. He said his brother wouldn't do that. After he said that his brother and my mother came over to where we were. The one that was with my mother told the one that was with me to take my mother over there so he could be with me. Then he told me to take my clothes off and I told him not and he pointed the gun at me and said take your pants off. I took my pants off and he made me lay down on the ground. He zipped his pants down and he took out his penis and got on top of me and then he put it in me and had intercourse with me. He didn't finish because his friend came over and said "come on". He said no. and his friend said "Boy you must be crazy, but you better come on". Then he got up and I put my pants back on and they took us back out the way they brought us in. They walked up the street and we went down the street. While we were walking down the street my mother told me that the first boy made her take her clothes off and she was leaning against the wall and he took his pants down and had intercourse with her. That was the same boy that had intercourse with me, the other boy didn't bother either one of us.

The first is a negro, about 5'5", very thin, medium brown skin, wearing a blue shirt and grey pants... the other boy is a negro, heavier than the first and a little taller, had a beard and a thin mustache he was light brown skin, wearing a white Tee shirt and brown pants and he had two of his fingers on the right hand bandaged up. If I see them again I can identify them.

I can read and write and I have read this and it is true and correct.

Completed at 12:44 P.M. 8-8-67

Linda Louise Smith  
Louise-Linda Smith  
Linda Louise

Typed and witnessed by: Pvt. Theresa W. Johnson

Theresa W. Johnson A-18



METROPOLITAN POLICE DEPARTMENT  
Washington, D. C.

STATEMENT OF FACTS

*C. 1440-67*

C. C. R. NO.	235-371
PC NO.	11-67-22352
T. T. NO.	11-67-212
DET. BUREAU SQUAD NO.	CID-67-773
X NO.	

NAME AND RANK OF OFFICER HANDLING CASE IN COURT  
Det. William A. Holden, Box 8, 42d

PRECINCT C.I.D.	CASE NO.	CHARGE Rape
NAME OF DEFENDANT William Andrew Brown		ADDRESS 1135 Chicago St. S.E.
SEX Male	COLOR Negro	AGE 21
LOCATION WHERE OFFENSE OCCURRED 1700 block of T St. S.E.		DATE AND TIME OF OFFENSE 11:45 P.M., 8-7-67
LOCATION OF ARREST 1420 block of 17 St. S.E. & 17 & 1 St. SE		DATE AND TIME OF ARREST 8:45 P.M. and 8:55 P.M., 9-12-67

STATEMENT OF FACTS BY OFFICER (INCLUDE ANY STATEMENT BY DEFENDANT):

Louise Smith, negro, female, 39 yrs and Linda Smith, negro, female, 18 yrs of 1406 14th Pl. S.E. report about 11:45 P.M., 8-7-67, while walking on the west side of the 1800 block of 17 St. S.E., they were approached from the front by two negro males, both of them had guns. They pointed the guns at them and told them if they screamed they would shoot. They took both of them across the street and up the alley on a construction job and one of the subjects later identified as Brown had intercourse with the mother while Greenwood held the daughter at the end of the building. When Brown finished having intercourse with Mrs. Smith he then went over and had intercourse with Linda Smith. When they finished they both left the scene and the complainants went home and reported this offense. They were transported to D.C. General Hospital where they were examined and report is attached.

On 9-13-67 a lineup was held at police headquarters consisting of 8 negro males and the above two defendants were positively identified as the subjects who were guilty of the above offense and they related that Brown was the one that had intercourse with both the mother and daughter and that Greenwood stood by but did not have intercourse with either one of them.



LIST THE NAME, ADDRESS AND STATEMENT OF EACH WITNESS.

NAME (LAST - FIRST - MIDDLE)	SEX	AGE	ADDRESS	PHONE NO.
1. <u>Linda Smith</u>				

STATEMENT  
The complainant

NAME (LAST - FIRST - MIDDLE)	SEX	AGE	ADDRESS	PHONE NO.
2. <u>Louise Smith</u>				

STATEMENT  
Complainant

NAME (LAST - FIRST - MIDDLE)	SEX	AGE	ADDRESS	PHONE NO.
3. <u>Det. W.R. Holden, Sex Squad</u>				

STATEMENT  
Investigating officer

NAME (LAST - FIRST - MIDDLE)	SEX	AGE	ADDRESS	PHONE NO.
4. <u>Det. BB Bryant, 11 Pct.</u> ✓				

STATEMENT  
Investigating officer and arresting officer

NAME (LAST - FIRST - MIDDLE)	SEX	AGE	ADDRESS	PHONE NO.
5. <u>Pvt. C.E. Jones</u>				

STATEMENT  
Arresting officer.

FINAL DISPOSITION OF CASE

(THIS STATEMENT MUST BE SIGNED BY THE OFFICER)

William R. Holden  
Signature

104

PD form 163  
back side

A-20

COURSE OF PROCEEDINGS -- OFFENSES REPORTED AT KRAMER JUNIOR HIGH  
SCHOOL ON SEPTEMBER 12, 1967

(1) The ADW (Gun) charge against Greenwood based upon the complaint of Harry S. Shaw was "No-Papered" on September 13, 1967, following the identification of Greenwood at the police lineup proceedings on that day. The charges were not renewed at any time and no indictment was returned in respect to this reported offense. It is not known whether an indictment was sought.

(2) The Robbery (PBS) complaint of Regina Harvey was referred to the Grand Jury and resulted in an original indictment against Brown only, returned on November 15, 1967 (assigned Criminal Case No. 1442-67), charging Brown with commission of the offense of Robbery (22 D.C. Code §2901). (The police testimony on remand as well as the several police records included in this Addendum clearly establish that Regina Harvey could not identify Greenwood as having been implicated in the pocketbook snatching reported by her.) Following a trial finding by Judge Gasch on October 7, 1968 that Brown was not guilty by reason of insanity of the charges in Criminal Case Nos. 1440-67, 1441-67 and 1443-67 (consolidated for trial as to Brown only), the Government on November 8, 1968 moved for dismissal of the indictment against Brown in Criminal Case No. 1442-67 (the purse-snatching complaint of Regina Harvey). The Government's motion was granted and the indictment dismissed.

(3) The complaints of Geraldine Gaines and Yvette Belt were referred to the Grand Jury and resulted in an original indictment returned November 15, 1967 (Criminal Case No. 1443-67) charging Blagmon, Greenwood and Brown with two counts of Assault With Intent to Commit Rape (22 D.C. Code §501) and with two counts of Assault With a Dangerous Weapon (22 D.C. Code §502). Brown was found not guilty by reason of insanity of the charges in this indictment by Judge Gasch on October 7, 1968. Greenwood and Blagmon were brought to trial on this indictment on October 17, 1968, at which time, immediately following the Government's opening statement, upon oral motion by Greenwood for judgment of acquittal, a judgment of acquittal was entered by Chief United States District Judge Edward M. Curran, upon the ground that as a matter of law there was insufficient evidence to connect Greenwood to the offenses charged, and the indictment as to Greenwood was dismissed. Blagmon entered a plea of guilty to one count of Assault With Intent to Commit Rape, and was adjudged convicted on his plea and sentenced to a term of from three (3) to nine (9) years.

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

ROBERT M. STEAKINS, Clerk

UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal Nos. 1440-67
	)	1441-67
WILLIAM A. BROWN	)	1443-67

FINDINGS OF FACT AND ORDER

This matter came before the Court for trial on October 7, 1968, and upon consideration of the Stipulation of Facts and testimony of Dr. Platkin, the Court found the defendant not guilty by reason of insanity with respect to the indictments, namely, Criminal Nos. 1440-67, 1441-67, and 1443-67, the same having been consolidated for trial, which charge rape and assault with a dangerous weapon, respecting certain named complainants.

The Court having received certain additional evidence from Dr. Platkin of St. Elizabeth's Hospital as to defendant's present mental condition and the defendant by his counsel with the approval of the United States Attorney and the consent of the Court having waived his right to trial by jury and any other rights as set forth in §24-301(d) of the D. C. Code, as interpreted in the light of Bolton v. Harris, 395 F.2d 642 (D.C. Cir. 1968), the Court finds by a preponderance of the evidence that

(1) the defendant William A. Brown is presently suffering from a mental illness described as inadequate personality with obsessive compulsive features with basic underlying

facts indicating that this defendant has engaged in, and  
is likely to engage in, violent sex conduct with women  
in order to fulfill his desires and by way of asserting  
mastery over people; and (2) by reason of such illness,  
this defendant is likely to injure himself and others if  
allowed to remain at liberty,

WHEREFORE it is by the Court this 7th day of  
October, 1968,

ORDERED that the defendant William A. Brown be  
and he is hereby committed to St. Elizabeth's Hospital until  
release therefrom by order of the Court pursuant to 24  
D. C. Code, §301(e).

*Walter G. Lash*

Judge

43417

8221 1700

NEW YORK STATE BAR ASSOCIATION



UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA

vs.

Benjamin O. Greenwood  
Probationer

Criminal No. 293-66

Probation No. 21098

STATEMENT OF VIOLATION OF PROBATION

I hereby acknowledge that I have been informed by John P. Forsinger, U. S. Probation Officer, that I have violated the conditions of probation granted me by this Court in the following manner:

1. On January 14, 1969 probationer was found guilty of Assault with Intent to Commit Rape (two counts) and Assault with a Dangerous Weapon (two counts) after trial before Judge June L. Green in Criminal Case #1440-67.

I further acknowledge that a probation officer has discussed this violation with me and has informed me that I will be given an early hearing before the Court on this charge of violating my probation. I have received a copy of this statement.

Dated: January 29, 1969

Benjamin O. Greenwood, III  
Benjamin O. Greenwood, III

Witnessed: John P. Forsinger

U. S. Probation Officer

FW:JPM:ccc

1-28-69

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA :

vs. :

Criminal No.1440-67

BENJAMIN O. GREENWOOD, III :

ORDER

(N) Upon oral hearing and consideration of defendant's motion to suppress the identification of the defendant by the complaining witnesses, Mrs. Louise Smith and her daughter Linda, it appearing to the Court that there was probable cause to arrest the defendant on September 12, 1967, based upon the several other complaints not involved in this case; i.e., pocket-book snatching, attempted rape and assault with a dangerous weapon, which were brought to the arresting police officers' attention and the admitted on-the-scene identification by Mr. Shaw of the defendant as one of the parties who had assaulted Mr. Shaw; it also appearing to the Court that both Mrs. Smith and Linda Smith had ample opportunity to view the defendant at the scene of the rape on August 7, 1967, and that Linda Smith had also seen and spoken with the defendant several weeks prior to the rape; it also appearing to the Court that the complainants individually identified the defendant at a police line-up and in a police show-up room after the line-up, and that the police line-up procedure itself was proper and not suggestive; and it further appearing that defendant had assistance of counsel at the line-up even though he had not yet been arraigned in the present case,

it is, therefore, this 1<sup>st</sup> day of February 1969,

ORDERED that defendant's motion to suppress the identification of the complainants is hereby denied.

  
JUDGE

LINEUP IDENTIFICATION TESTIMONY OF MRS. LOUISE N. SMITH

Q. "What was it about the person that you picked out of the lineup that you saw that made you certain that he was the person you saw on August 7?" (Tr. 57)

A. "Well he looked -- I mean he looked -- he looked kind of like the same person and he acted -- I mean the way he acted, kind of, you know, he was acting -- the way he was acting in the lineup, the way he was acting that night, you know, I mean." (Tr. 58)

Q. "We are talking about Greenwood." (Tr. 58)

A. "Yes, about Greenwood. So I figured he looked like the same guy to me." (Tr. 58)

\* \* \*

Q. "Now the person that you picked out of the lineup as being Greenwood or the person you picked out and learned the name was Greenwood after you picked him out, what was it about him that caused you to pick him out?" (Tr. 77)

A. "Well, it just -- I mean looked -- looked like the same, kind of like the same guy to me. I mean I couldn't tell at first, I mean, because it wasn't too much light, as I said, and he -- he just -- I mean his reactions, what made me be sure that was him." (Tr. 77)

Q. "What do you mean by reaction?"

A. "Some way he was acting. He was acting like he was uncomfortable or something." (Tr. 77)

Q. "You mean by the way he was walking, what he was doing with his hands?" (Tr. 78)

A. "Yes. The way he was acting as if he was tired or something, so at the lineup he was acting the same way, and as I said, he had those same bandages on his hand. He wasn't wearing the same clothes." (Tr. 79)

\* \* \*

Q. "Now the bandages that you said were on the gentleman at the lineup, would you describe the bandage?" (Tr. 79)

A. "Yes. It was some tape. I don't know -- I think -- I don't know what kind of bandage it was. All I know it was white and it looked like it might have been tape, but I don't know exactly." (Tr. 79, 80)

Q. "Was it on one finger or more than one finger?" (Tr. 80)

A. "It looked like to me it was on more than one finger -- or more than one." (Tr. 80)

Further reference is made to the following testimony of Mrs. Smith on remand:

Q. "At any rate you told him you weren't sure of Greenwood?" (Tr. Rem. 22)

A. "I told him I wasn't sure of Greenwood but I was sure of Brown and then later I said -- I told him I was sure of Greenwood because of his reaction and he had the bandage on his fingers." (Tr. Rem. 22)

Q. "What reaction are you talking about?" (Tr. Rem. 22)

A. "I mean the way he was acting like he was upset about something and he was acting the same way that day." (Tr. Rem. 22)

\* \* \*

Q. "On what basis did you pick Mr. Greenwood out of that lineup?" (Tr. Rem. 28)

A. "The way he -- the way he was acting that night and the way --" (Tr. Rem. 28)



Q. "The way he was acting the night of August the 7th?"  
(Tr. Rem. 28)

A. "Yes, and the way he looked -- and the bandage was on his fingers." (Tr. Rem. 28)

\* \* \*

Q. "It is a fact, isn't it, Mrs. Smith, that you could not with certainty identify Mr. Greenwood at the lineup the first time you saw him." (Tr. Rem. 35)

A. "Well, I did at first. I mean I identified him right away, but when the -- this detective or whoever it was asked me, 'Are you sure?' it kind of made me nervous and I says, 'No, I am not sure.' Then I got another look at him and noticed the bandage on his fingers and I thought it was him." (Tr. Rem. 35)

Q. "Would you say it was primarily the fact of the bandage on his fingers that made you believe it was Greenwood?" (Tr. Rem. 35)

A. "Yes, and --" (Tr. Rem. 35)

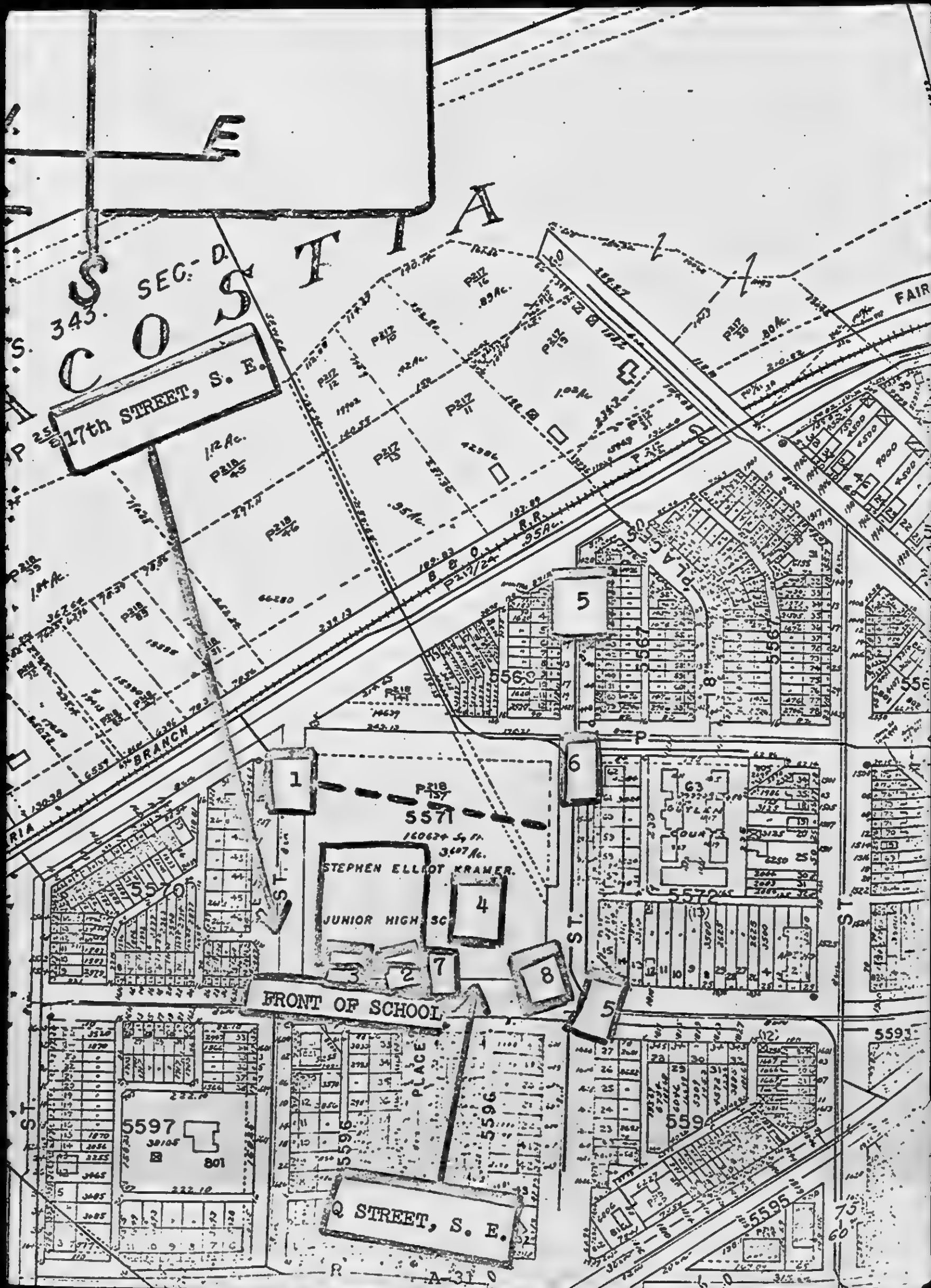
Q. "Would you say --" (Tr. Rem. 35)

THE COURT: She is saying something else.

BY MR. KOROMZAY:

Q. "Would you please --"

A. "The bandage and the way he was acting I was sure that was him, this reaction." (Tr. Rem. 35)



ANNOTATIONS TO MAP OF KRAMER JUNIOR HIGH SCHOOL

1. Greenwood arrested at about 8:45 p.m., west side of Kramer Junior High School, 1500 block of 17th Street, S. E., Washington, D. C.; apprehended and placed under arrest by Officer Carnwell C. Dean.
2. School Janitor, Harry Sonny Shaw, assaulted in front of Kramer Junior High School by two negro males carrying guns at about 8:30 p.m.
3. Geraldine Gaines and Yvette Belt approached by Blagmon and Brown in front of Kramer Junior High School at about 8:30 p.m. and forced to enter school grounds.
4. Geraldine Gaines and Yvette Belt assaulted in school grounds by Blagmon and Brown; Blagmon and Brown arrested inside school grounds; one starter pistol recovered from each (see P.D. Form 251 at p. A-8 ).
5. Regina Harvey's pocketbook snatched by Brown; P.D. Form 251 reports offense in 1400 block of 18th Street, S. E. (one block north of the school grounds); Detective Bryant testified that this offense was reported at 18th and Q Streets, S.E. (1500 block of 18th Street, S. E.).
6. Detective Bryant (in cruiser) and Officer Dean (on motor scooter) approached Kramer Junior High School on the East (Detective Bryant heading South on 18th Street, S.W., in response to a radio run for Robbery); Bryant and Dean see Negro male running from East to West in school grounds behind building, following report by unidentified cab driver that a man jumped the fence and was running through the playground. Officer Dean directed by Detective Bryant to go around front of school and to the other (west) side. Greenwood apprehended by Officer Dean on west side of school, coming down over the west fence. Greenwood placed under arrest as in #1.
7. Greenwood brought around to front of school after his arrest by Officer Dean on west side of school. Subsequently identified in front of school by Elizabeth Gaines and Yvette Belt as having entered the school grounds and having said: "The police are coming." Also identified in front of school by janitor Harry S. Shaw, as having been with Blagmon and Brown.
8. "Jostling" of Regina Harvey observed by Geraldine Gaines and Yvette Belt.

JUNIOR HIGH SCHOOL

ST.

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802

239200

ACOSTA

JUNIOR

SCHOOL

ST.

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PLACE

60

MINNEAPOLIS

ALLEY

ANACOSTA

PUMP

STA

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District of Columbia

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ANNOTATIONS TO MAP OF 17th AND T STREETS, S. E.

1. 1733 T Street, S. E.; address at which Louise Smith and Linda Smith were visiting with Mrs. Lois Moore, married daughter of Mrs. Louise Smith. Louise Smith and Linda Smith left this address at approximately 11:30 to 11:45 p.m. on August 7, 1967.
2. Louise Smith and Linda Smith confronted by William Brown on the east side of the 1800 block of 17th Street, S. E.; Greenwood initially on opposite (west) side of street.
3. Scene of alleged rape of Louise Smith and Linda Smith by Brown and Greenwood; victims taken into alley behind 1700 block of T Street, S. E.; offense at construction site behind 1708 T Street, S. E.
4. 1406 Ridge Place, S. E.; residence address of Mrs. Louise Smith and Linda Smith, to which they were returning at the time of the alleged offense.





CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing Brief for Appellant by delivering a copy thereof to the Office of the United States Attorney for the District of Columbia, at the United States Court House, Washington, D. C., this 30th day of April, 1970.

---

Dennis Koromzay

WRIT FOR HABEAS CORPUS

United States Court of Appeals  
FOR THE DISTRICT OF COLUMBIA Circuit

No. 22875 and 22910

UNITED STATES OF AMERICA, APPELLEE

v.

SEYMOUR C. GREENWOOD, APPELLANT

Appeals from the United States District Court  
for the District of Columbia

United States Court of Appeals

THOMAS A. FLANNERY  
United States Attorney

JUN 18 1970

JOHN A. TERRY,

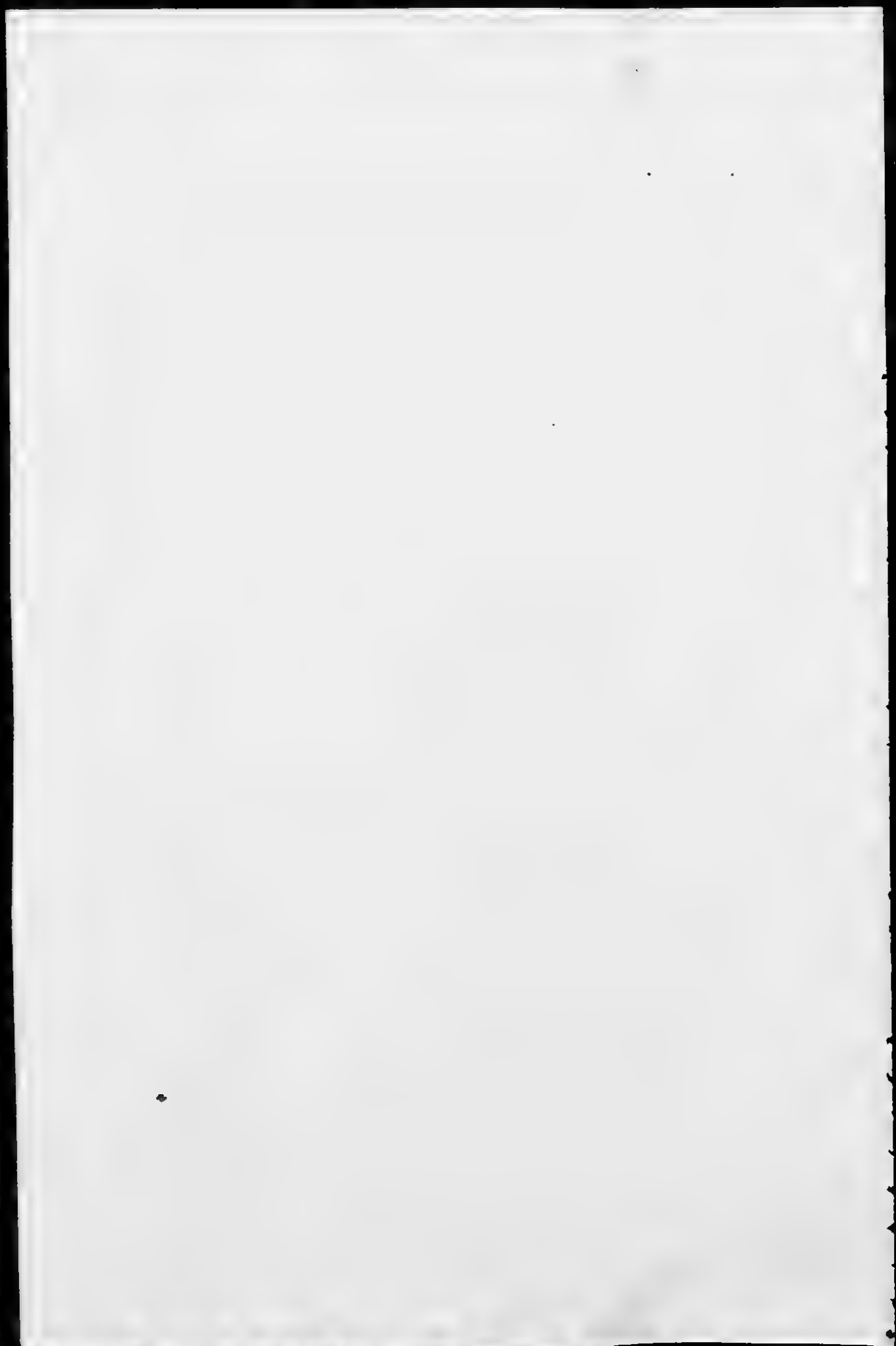
DANIEL HARRIS,

WARREN L. MILLER,

Assistant United States Attorneys

Case No. 22875

Case No. 22910



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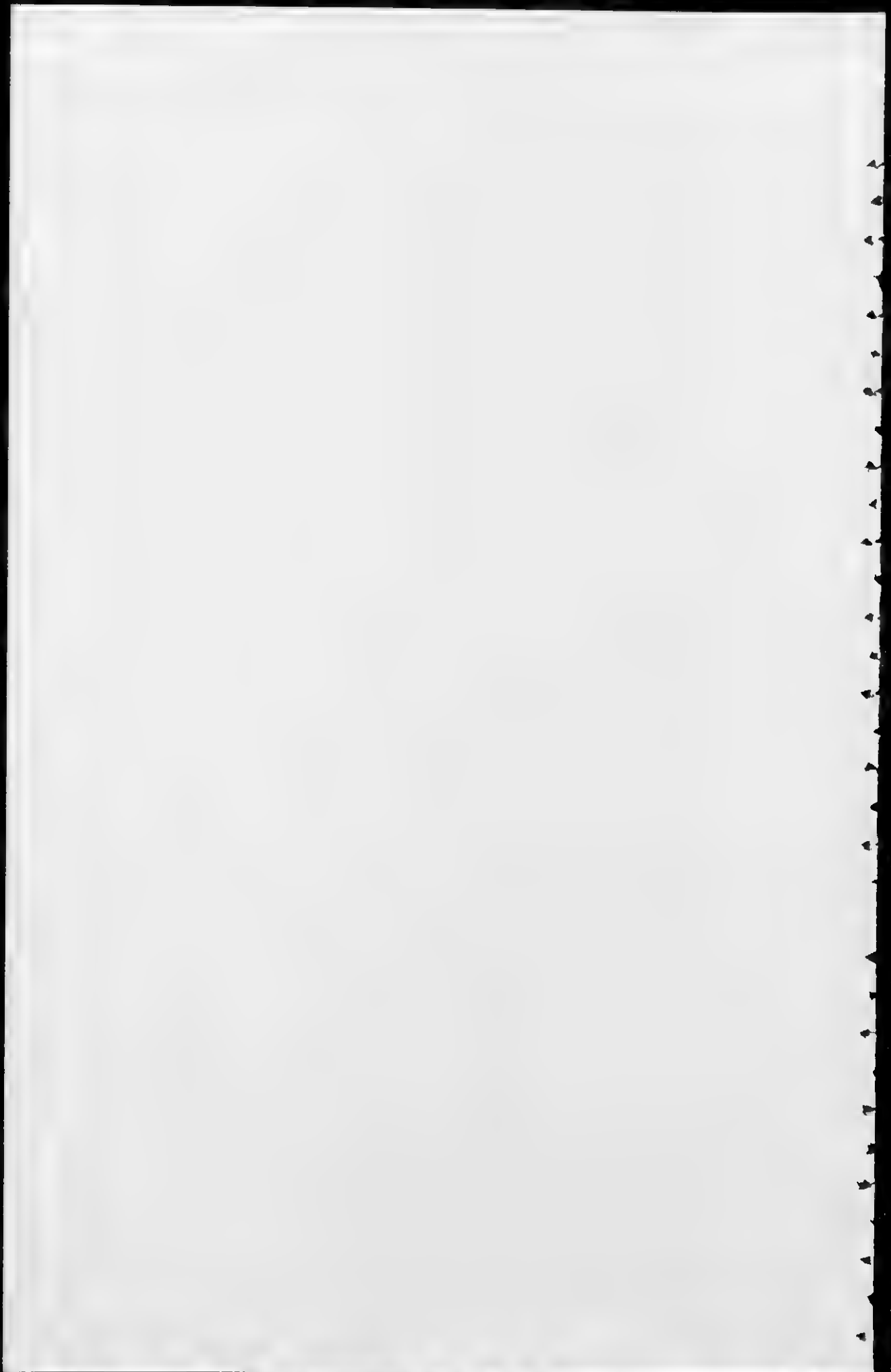
## ISSUES PRESENTED \*

In the opinion of appellee, the following issues are presented:

1. Where appellant challenges the lineup identification as being the fruit of his illegal detention,
  - (a) Did probable cause exist for appellant's arrest?
  - (b) Did the holding of the lineup prior to presentment before a magistrate violate appellant's *Malory* rights?
2. Was appellant denied his constitutional right to due process of law at the lineup identification where he was represented by an experienced Legal Aid Agency attorney, when the lineup was conducted fairly and was not unnecessarily suggestive?
3. Were the court's instructions to the jury proper:
  - (a) where the court gave a lesser included offense instruction on assault with intent to commit rape; and
  - (b) where the trial court repeated the lesser included offense instruction twice and answered the jury's question regarding the applicability of the aiding and abetting instruction to the lesser included offense.
4. Was appellant denied his constitutional right to a speedy trial?
5. (a) Was the revocation of appellant's probation proper where he had effective assistance of counsel at the hearing?
  - (b) Did the court abuse its discretion in revoking appellant's probation?

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\* This case has not previously been before this Court. During the pendency of this appeal, however, the Court remanded this case to the District Court for an evidentiary hearing on the pretrial identification of appellant. See order entered October 21, 1969. The case is now back before this Court after remand.





# **United States Court of Appeals**

**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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**Nos. 22,875 and 22,910**

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**UNITED STATES OF AMERICA, APPELLEE**

**v.**

**BENJAMIN O. GREENWOOD, APPELLANT**

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**Appeals from the United States District Court  
for the District of Columbia**

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**BRIEF FOR APPELLEE**

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## **COUNTERSTATEMENT OF THE CASE**

By a two-count indictment filed on March 14, 1966 (Criminal No. 298-66), appellant was charged with robbery and unauthorized use of a vehicle (22 D.C. Code §§ 2901 and 2204, respectively). On April 27, 1967, appellant pleaded guilty to the charge of unauthorized use of a vehicle in the District Court before Judge Gasch. The court suspended imposition of sentence and placed appellant on probation for a period of five years on June 30, 1967. At a hearing on violation of probation before Judge Green on February 28, 1969, appellant's probation was revoked, and a sentence of one to three years was imposed. This appeal (No. 22,910) followed.

On November 15, 1967, appellant and William A. Brown were charged in a four-count indictment (Criminal Case No. 1440-67) with rape and assault with a dangerous weapon (22 D.C. Code §§ 2801 and 502, respectively) in connection with the rapes perpetrated at gunpoint upon Louise N. Smith and her daughter, Linda L. Smith (now Mrs. Linda L. Higgins) on August 7, 1967. Appellant was tried before the honorable June L. Green and a jury on January 10, 13, and 14, 1969. Appellant was found not guilty of rape in counts one and three of the indictment, but guilty of assault with intent to commit rape under each of these same counts and guilty of assault with a dangerous weapon under counts two and four of the indictment. On February 28, 1969, appellant was sentenced to a term of from four to twelve years, to run consecutively to the sentence imposed in Case No. 298-66. This appeal (No. 22,875) followed.

The two appeals were consolidated on August 20, 1969. On October 21, 1969, this Court granted appellant's unopposed motion to remand the record for further proceedings with respect to the pre-trial identification of appellant. Pursuant to the order of remand, the District Court held a hearing on January 16 and 19, 1970. After receiving testimony the court ruled that there was probable cause to arrest appellant; that both complainants had ample opportunity to view appellant at the scene of the rape; that the lineup was proper and not suggestive; and that appellant had counsel at the lineup.

#### Pre-Trial Proceedings

Since one of appellant's contentions on appeal is that he was denied his constitutional right to a speedy trial, appellee here presents a brief chronology of the more significant events in the case between the date of the offense and the commencement of trial on January 10, 1969.<sup>1</sup>

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<sup>1</sup> This information has been gleaned from the jacket entries and from the records of the assignment office in the District Court.

<u>Date</u>	<u>Event</u>
August 7, 1967	Offense
September 12, 1967	Appellant and co-defendant Brown arrested for another offense.
September 13, 1967	Lineup held. Appellant and co-defendant Brown identified by both victims of rape.
September 19, 1967	Preliminary hearing held.
November 15, 1967	Indictment returned.
December 1, 1967	Arraignment held, plea of not guilty entered by appellant. Attorney Donald Meaney present for arraignment only.
December 6, 1967	DeLong Harris appointed by court to represent appellant.
December 21, 1967	Motion of co-defendant Brown for mental examination filed.
January 5, 1968	Brown's motion for mental examination granted.
February 16, 1968	Appellant's motion for release on personal recognizance filed.
February 21, 1968	Bail Agency Report filed.
March 8, 1968	Appellant's motion for release on personal recognizance heard and denied.
March 28, 1968	Order extending period for mental examination of Brown an additional thirty days.
April 12, 1968	Letter from Saint Elizabeths Hospital requesting additional fifteen days for report to be filed.
April 16, 1968	Order extending confinement of Brown in Saint Elizabeths for fifteen days.
April 23, 1968	Letter from Saint Elizabeths advising that Brown is competent for trial.
May 15, 1968	Oral motion by DeLong Harris to withdraw as counsel for appellant denied.
May 17, 1968	Order finding Brown competent to stand trial.
May 31, 1968	Motion of DeLong Harris to withdraw as counsel heard and granted. Case referred for appointment of new counsel for appellant.

<u>Date</u>	<u>Event</u>
June 3, 1968	Order vacating DeLong Harris, Esq., and appointing Samuel J. L'Hommedieu, Jr., Esq., as counsel for appellant.
June 12, 1968	Order dated June 11, 1968 appointing Paul Terrence O'Grady as co-counsel for appellant.
August 1, 1968	Appellant's motion for release on personal recognizance or alternatively for setting of bond filed. Bail Agency Report requested and filed.
August 5, 1968	Motion by Brown, for severance and separate trial filed.
August 16, 1968	Appellant's motion for release on personal recognizance granted. Order specifying conditions of release filed.
August 26, 1968	Appellant's case set for trial on September 9, 1968 as a date certain.
September 5, 1968	Trial continued from September 9 to September 23, 1968 at request of appellant.
September 13, 1968	Appellant's motion to dismiss for lack of speedy trial denied. Brown's motion for severance and separate trial granted (by consent).
September 20, 1968	Trial continued from September 23 to October 24, 1968 at request of government with concurrence of counsel for appellant.
October 7, 1968	Non-jury trial of Brown begun and concluded. Brown found not guilty by reason of insanity and committed to Saint Elizabeths.
October 29, 1968	Trial continued to November 6, 1968 at request of appellant. (Appellant had been tried in another case during October 1968).
November 1, 1968	Trial continued to November 25, 1968, by the court.
December 17, 1968	Trial continued to January 6, 1969, at request of government. Assistant United States Attorney Harris and one of the complaining witnesses were ill.
January 10, 1969	Oral motion of appellant to dismiss indictment for lack of speedy trial heard and denied. Trial begun.

### The Arrest

On September 12, 1967, at approximately 8:45 p.m., Detective Boyd B. Bryant of the Metropolitan Police received a radio run for a robbery (pocketbook snatching) at Eighteenth and Q Streets, S.E. Upon arriving on the scene, Bryant was stopped by an unidentified cab driver who related that "the man jumped the fence" and was fleeing through the playground of Kramer Junior High School (Rem. Tr. 99-100).<sup>2</sup> Bryant observed the subject running across the school grounds and told Officer Carnwell C. Dean of the Metropolitan Police, who was on a motor scooter, to go around in front of the school to stop him. Dean apprehended the man on top of the fence coming over to the outside of the school yard (Rem. Tr. 109). This man was appellant, Benjamin O. Greenwood III (Rem. Tr. 100). After appellant and two other men (Brown and Blagman) were apprehended, Bryant interviewed Miss Regina Harvey, Mr. Harry Shaw, Miss Yvette Belt and Miss Geraldine Gaines. Their statements revealed that in a period of only a few minutes appellant had assaulted Mr. Shaw with a gun; that he was with Brown and Blagman when they jostled Miss Harvey and Brown snatched her pocketbook; and that appellant stood as a lookout and alerted Brown and Blagman as they attempted to rape Miss Belt and Miss Gaines behind the school (Rem. Tr. 101-103). Appellant was identified on the scene by Miss Gaines and Miss Belt as the one who ran past them while they were being assaulted and hol-lered, "Here come the police". They also identified ap-pellant as the one who jostled Miss Harvey and assaulted Mr. Shaw, having witnessed both incidents (Rem. Tr. 110-111). Mr. Shaw identified appellant as one of the subjects who assaulted him with a gun only ten minutes earlier (Rem. Tr. 101-102).

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<sup>2</sup> The three transcripts in the record will be separately identified. The trial transcript will be cited herein as "Tr."; the transcript of the probation revocation as "Prob. Tr."; and the transcript of the remand proceedings as "Rem. Tr."

### The Lineup

At 9:30 the following morning, September 13, 1967, an eight-man lineup was held at police headquarters. Appellant and Brown were viewed by a number of women, including Mrs. Louise Smith and her daughter Linda, the victims of a rape that had occurred on August 7, 1967. Both Louise Smith and Linda Smith separately made identifications of appellant and William A. Brown as the two men who attacked them on the night of August 7 (Rem. Tr. 132-133). Throughout the lineup procedures, the two complainants were kept separated, and each was accompanied by a detective (Rem. Tr. 21). At no time before or during the lineup proceedings did the two complainants talk to one another (Rem. Tr. 33-34, 38). After identifying appellant and Brown, Mrs. Smith and her daughter were brought to another room in the back of the stage area where they again separately viewed and identified the two men by touching each one (Rem. Tr. 26, 51-52, 62, 135). Appellant was represented during the lineup procedures by Mr. Jon Feldman, a staff attorney of the Legal Aid Agency who had been called by the police to come over and insure that the lineup was fairly conducted (Rem. Tr. 60, 90). Directly following the lineup, charges of rape were filed against appellant and Brown, and they were taken over to the Court of General Sessions where they were presented on this charge before the judge sitting in Assignment Court.

### The Trial

Mrs. Louise N. Smith (also known as Nora Louise Smith (Tr. 87)) testified that on the evening of August 7, 1967, she had been visiting with one of her daughters, Lois Moore, who resided on T Street, S.E. (Tr. 49). Around 10:00 or 11:00 p.m. she left her daughter's house and walked down T Street to Seventeenth Street accompanied by her other daughter, Linda Smith (Tr. 50-51). As they proceeded down the street they were approached



by a young man with a gun (later identified as Brown), who stated that he did not want their money but "he wanted to fuck" (Tr. 52-54). A second man then came across the street, pointed his gun at the two women, and said, "Do what my brother said" (Tr. 52-53, 59, 70). This second man was later identified as appellant (Tr. 58). Mrs. Smith and Linda were then taken at gunpoint into a nearby building that was under construction.<sup>3</sup> Once inside, appellant took Linda to one part of the structure and Brown ordered Mrs. Smith to take off her clothes. When she refused, he pushed his gun into her side. She then took off her underclothes, and he forced her to have sexual intercourse with him (Tr. 59-60). Following this, appellant reappeared and stated that Linda would not submit to him, whereupon Brown said "he would take care of her." Appellant took Mrs. Smith to another part of the building, leaving Linda and Brown inside. While in the other room, appellant did not attempt to have sexual relations with Mrs. Smith and stated to her that his "brother" (Brown) was sick and that the only way appellant could help him was "by helping him do these things" (Tr. 61, 65). During the time Mrs. Smith and appellant were talking, appellant gave her the gun for a few minutes, which she returned to him shortly thereafter. She stated that she did not attempt to use it for fear that if she tried, she or her daughter might have gotten hurt (Tr. 66, 71-73). After Mrs. Smith became worried that Brown was hurting her daughter, appellant went over to where Brown was and told him "to come on, let's go." Then Mrs. Smith went with appellant to where Linda and Brown were and observed Linda in her underclothes. As the four left the building, appellant and Brown ran up Seventeenth Street (Tr. 66). Mrs. Smith proceeded directly home with Linda and told her husband what had happened. Mr. Smith took the women directly to the police (Tr. 88-89).

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<sup>3</sup> Subsequent investigation by the police revealed that the offense took place at 1708 T Street, S.E. (Tr. 127).

Linda Smith's testimony consisted of essentially the same facts that her mother had related, except that she gave an account of what occurred when she was alone with each of the two men. Linda testified that appellant initially demanded that she take off her clothes, which she refused to do. Afterwards, when Brown was with her, he demanded that she take off her clothes, which request she also refused. He then pointed the gun at her head and said, "Do what I say. I said take your clothes off." Brown then forced her to have sexual intercourse with him on the dirt floor (Tr. 104-105, 109).

Detective Melvin R. Cass of the Metropolitan Police testified regarding the complainants' physical condition when they came to the precinct to report the rape on the night in question, and Sergeant William R. Holden testified regarding the lineup that was held on September 13, 1967, in which appellant and Brown were identified by both complainants (Tr. 124-127, 130-136). The Government also called Dr. Timothy Tomasi, a physician at D.C. General Hospital, who examined the two complainants at 4:45 a.m. on August 8, 1967, just a few hours after the offense. His examination revealed intact sperm inside the vaginal vault of Mrs. Smith. No intact sperm was found upon examination of Linda Smith (Tr. 137-142, 145-146).

Appellant presented no defense, and after several motions were made by appellant and denied, the case was submitted to the jury pursuant to the court's instructions.

#### **The Revocation of Probation Hearing**

On February 28, 1969, the District Court found that appellant had violated his probation in Criminal Case No. 298-66, in which he had been placed on probation for a period of five years. The court revoked probation and sentenced appellant to a term of one to three years. Immediately, thereafter the court imposed sentence in the other case, Criminal No. 1440-67. The sentence in

the latter case was made to run consecutively to the sentence imposed on the revocation of probation.

### ARGUMENT

**I. The lineup identification of appellant was not the fruit of appellant's illegal detention.**

(Rem. Tr. 90, 99-102, 109-111)

**A. The trial court properly ruled that probable cause existed for appellant's arrest.**

Appellant initially contends that the arresting police officer lacked probable cause to arrest him and, therefore, that the subsequent identification of appellant at a lineup was the fruit of an illegal detention. Appellee finds this claim unpersuasive.

In *Bailey v. United States*, 128 U.S. App. D.C. 354, 357-358, 389 F.2d 305, 308-309 (1967), this Court had occasion to summarize the applicable standards for determining the existence of probable cause:

Probable cause is a plastic concept whose existence depends on the facts and circumstances of the particular case. It has been said that "[t]he substance of all the definitions of probable cause is a reasonable ground for belief of guilt." *Brinegar v. United States*, 338 U.S. 160, 175 (1949). Much less evidence than is required to establish guilt is necessary. *Draper v. United States*, 358 U.S. 307, 311-312 (1959). The standard is that of a "reasonable, cautious and prudent peace officer" and must be judged in the light of his experience and training. *Bell v. United States*, 102 U.S. App. D.C. 383, 387, 254 F.2d 82, 86, cert. denied, 358 U.S. 885 (1958). The police must have enough information to "warrant a man of reasonable caution in the belief" that a crime has been committed and that the person arrested has committed it. *Carroll v. United States*, 267 U.S. 132, 162 (1925). See also *Henry v. United States*, [361 U.S. 98, 102 (1959)]. A finding of probable cause depends on the "practical considerations of

everyday life on which reasonable and prudent men, not legal technicians, act." *Brinegar v. United States*, *supra*, 338 U.S. at 175.

When this "plastic concept" is applied to the facts of the instant case, the conclusion is inescapable that the police officer acted reasonably in making appellant's arrest. As in many cases, no one particular fact or circumstance can be relied upon to furnish probable cause, but when the circumstances in their totality are viewed the arrest was a proper one. Briefly, marshaling the information which confronted Officer Dean and Detective Bryant at the time of arrest, we note the following facts of which they became aware in rapid succession.

Having received a radio run for a robbery at Eighteenth and Q Streets, S.E., Bryant and Dean responded to the scene. Detective Bryant was stopped by an unidentified cab driver who stated that "the man just jumped the fence" and was fleeing through the playground of Kramer Junior High School (Rem. Tr. 99-100). Bryant saw appellant running through the playground and told Dean to go around in front of the school to stop him. Dean caught appellant coming over the top of the school yard fence (Rem. Tr. 109). Upon being brought back, appellant was identified on the scene by Miss Gaines and Miss Belt as the one who assaulted Mr. Shaw with a gun, jostled Miss Harvey during the robbery, and warned his two friends that the police were coming as they attempted to rape the two girls (Rem. Tr. 110-111). Moreover, Mr. Shaw identified appellant as one of those who had assaulted him with a gun only moments before (Rem. Tr. 101-102).

One would be hard pressed to suggest that probable cause was absent under these circumstances. The attempted flight of appellant<sup>4</sup> in conjunction with the in-

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<sup>4</sup> The attempted flight of appellant "was pertinent both on the issue of probable cause for arrest, and on the urgent need of taking action forthwith . . . ." *United States v. Curtis*, D.C. Cir. No. 22,470, decided May 19, 1970 (*en banc*), slip op. at 4-5.

formation provided by the radio run and statement of the cab driver clearly presented the arresting officer with a situation that required immediate action and warranted the apprehension of appellant. In *Daniels v. United States*, 129 U.S. App. D.C. 250, 252, 393 F.2d 359, 361 (1968) this Court held that for probable cause it "is enough that the police officer . . . received his information from some person—normally the putative victim or an eye witness—who it seems reasonable to believe is telling the truth." Clearly it is reasonable to infer that the cab driver witnessed the commission of the crimes as evidenced by the subsequent on-the-scene identification of appellant.

Thus we submit that since appellant's arrest was based upon probable cause, there is no foundation for his argument that the lineup identification was the product of a custody illegal from its inception.

***B. The lineup at which appellant was identified was a reasonable police procedure and was not violative of his Mallory rights.***

Having been arrested at 8:45 p.m. as the person who assaulted Mr. Shaw with a gun, jostled Miss Harvey during the robbery of her pocketbook, and stood as a lookout while his two companions attempted to rape the two young girls (Rem. Tr. 101-102, 109-111), appellant was transported immediately to the Eleventh Precinct stationhouse. The following morning, September 13, 1967, at 9:30 a.m. a lineup was held at police headquarters in which appellant and Brown were identified by Mrs. Smith and her daughter Linda as the men who had raped them five weeks earlier on August 7. Throughout the entire lineup proceedings appellant had counsel<sup>5</sup> to insure that the confrontation was fair. Following the lineup appellant and Brown were immediately taken to the Court of General Sessions for presentment to a committing magis-

<sup>5</sup> Mr. Jon Feldman, a staff attorney of the Legal Aid Agency represented appellant during the lineup (Rem. Tr. 90).

trate on the rape charges. Appellant contends that he was detained for a period of "unnecessary delay" in violation of Rule 5(a), FED. R. CRIM. P., and *Mallory v. United States*, 354 U.S. 449 (1957). Appellant relies primarily on this Court's decision in *Adams v. United States*, 130 U.S. App. D.C. 203, 399 F.2d 547 (1968), as the basis of his claim. Appellee submits that the *Mallory* rule is not applicable to lineups and that appellant's claim is without merit.

In *(Robert) Williams v. United States*, — U.S. App. D.C. —, 419 F.2d 740 (1969) (*en banc*), this Court expressly held that the *Mallory* rule does not apply to a lineup held prior to presentment before a magistrate. The Court in *Williams* took special notice of the effect which the *Adams* decision would have on post-*Wade*\* lineups and held that if an accused has his detention extended *before* presentment, the court would assess such detention "in the light of all the circumstances—the situs, method, length, and purpose of detention, and whether the delay promotes, rather than hampers, fairness to the individual and effective and intelligent law enforcement." *Williams, supra*, — U.S. App. D.C. at —, 419 F.2d at 743. However, the Court then stated:

If the lineup or other identification procedure is made in the presence of counsel for the suspect, there would be no basis for a claim the identification was excludible as a fruit of illegal delay in presentment. *Id.* at —, 419 F.2d at 743-744.

*Williams* is clearly dispositive of appellant's claim of a *Mallory* violation since appellant had counsel during the entire lineup.<sup>7</sup>

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\* *United States v. Wade*, 388 U.S. 218 (1967).

<sup>7</sup> Appellee further submits that since appellant did not raise the issue of a possible *Mallory* violation at trial, this issue cannot be properly considered on appeal. (*Lawrence) Green v. United States*, 128 U.S. App. D.C. 408, 389 F.2d 949 (1967) (*en banc*). Moreover, in *Adams* there was an admitted Rule 5(a) violation, whereas in the



II. Appellant was not denied his constitutional right to due process of law at the lineup identification.

(Tr. 16-18, 26, 77-82, 118-119, 123, 131-134;  
Rem. Tr. 14-16, 21-24, 28, 33-38, 46-47, 52-53,  
56-58, 66-67, 71, 74-75, 79, 82-92, 118, 123, 129-  
135)

A. *Representation by a competent and experienced Legal Aid Agency attorney at the lineup satisfied the requirements of United States v. Wade.*

In *Wade, supra*, the Supreme Court established the right to counsel at a lineup and specifically commented:

Although the right to counsel usually means a right to the suspect's own counsel, provision for substitute counsel may be justified on the ground that the substitute counsel's presence may eliminate the hazards which render the lineup a critical stage for the presence of the suspect's *own* counsel. 388 U.S. at 237 n.27. (emphasis added).

This Court, in holding that *Wade* applies to confrontations which occur at a preliminary hearing, has expressly suggested the use of "substitute counsel." *Mason v. United States*, 134 U.S. App. D.C. 280, 414 F.2d 1176 (1969). Moreover, in the recent case of *United States v. Kirby*, D.C. Cir. No. 23,106, decided April 24, 1970, slip op. at 5-8, this Court held that the defendant was afforded effective assistance of counsel at a lineup where he was represented by a Legal Aid Agency attorney who served as substitute counsel in the absence of the attorney assigned to represent him. In *Kirby* the Court recognized that in a case involving Legal Aid counsel, "[s]uch counsel are likely to have expertise in the matter of lineups, what information can and should be available to counsel from the police, what techniques may enhance reliability, etc." *Kirby, supra*, slip op. at 6.

instant case, the delay was neither appreciable nor unreasonable. Further, the burden of showing an unreasonable delay rests upon appellant. *Trilling v. United States*, 104 U.S. App. D.C. 159, 260 F.2d 677 (1968) (*en banc*). He has not sustained that burden.

In this case Mr. Jon Feldman, a staff attorney with the Legal Aid Agency, represented appellant and others in the lineup (Rem. Tr. 90). He was experienced in lineup procedures and representation of those in lineups (Rem. Tr. 84). The value of his presence was demonstrated by his suggestions (1) that the number of persons in the lineup should be increased from four to eight (Rem. Tr. 71), (2) that three of the eight remove their hats, and (3) that they change positions (Rem. Tr. 74). In addition, Mr. Feldman was aware that appellant was charged with rape (Rem. Tr. 71, 129), and he consulted briefly with appellant before the lineup (Rem. Tr. 89-90). Finally, it is important to recognize that at the time of the lineup appellant had no other attorney, since he had not as yet been presented before a magistrate. We submit that use of the Legal Aid counsel was therefore a reasonable and proper precaution, taken to insure compliance with the dictates of the *Wade* decision, and fulfilled appellant's Sixth Amendment right to counsel.

***B. The lineup procedure was not unnecessarily suggestive and comported with due process.***

The test laid down by the Supreme Court in *Stovall v. Denno*, 388 U.S. 293, 302 (1967), to determine whether to permit a witness to identify a defendant in court, is whether that in-court identification is the product of an identification procedure "so unnecessarily suggestive and conducive to irreparable mistaken identification that [the accused] was denied due process of law." This standard was later restated somewhat more narrowly in *Simmons v. United States*, 390 U.S. 377, 384 (1968), wherein the Court said that the Government might be precluded from using an in-court identification when the out-of-court "identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." In addition the Court has noted that whether an out-of-court identification is violative of due process must be determined in the context of the "totality of circumstances" surround-

ing that identification. *Stovall v. Denno, supra*, 388 U.S. at 302. Thus, in arriving at a determination of whether a witness should be allowed to make an in-court identification, the Court must first look at the circumstances of the out-of-court identification.

If the circumstances of the confrontation do not amount to a denial of due process that question [whether to allow the in-court identification] is answered in the affirmative. If, on the other hand, the confrontation has been so unfair as to amount to a denial of due process, the Government has the opportunity of establishing by clear and convincing evidence that the proffered in-court identification of the defendant by the witness has an origin independent of the witness' observation during the challenged confrontation.

*United States v. O'Connor*, 282 F. Supp. 963, 965 (D.D.C. 1968), *aff'd*, — U.S. App. D.C. —, 420 F.2d 644 (1969).

We take the position that the lineup procedure employed was not violative of due process. This conclusion was concurred in by appellant's counsel at trial, who repeatedly stated he was "satisfied about the way the lineup was conducted" and did not challenge its validity on due process grounds (Tr. 16-18, 26), and by Mr. Feldman, the Legal Aid attorney who represented appellant at the lineup, who stated that it was not suggestive in any way and was considerably fair (Rem. Tr. 87, 92). In spite of these statements by appellant's trial counsel and the Legal Aid attorney who represented appellant at the lineup, as well as the trial court's finding upon remand that the lineup procedure "was proper and not suggestive," appellant still presses his contention of suggestivity on appeal. His argument is premised on (1) the fact that appellant was the only person who had bandages on his right hand during the lineup and (2) Mr. Feldman's testimony during the remand proceeding that he thought the two complainants viewed the lineup together and talked about it.

The record clearly shows that Mrs. Smith and Linda Smith identified appellant at the lineup on the basis of his looks and the unusual nervous gesture which he demonstrated during the perpetration of the crime and at the lineup,<sup>8</sup> rather than solely on the basis of his wearing bandages on his right hand, as appellant now suggests. In fact, the bandages helped insulate against an "irreparable misidentification" and served as an additional basis for the reliability and accuracy of the identifications. In response to appellant's second contention that the complainants viewed the lineup together, we submit that the record abundantly supports the trial court's finding upon remand "that the complainants individually identified the defendant at a police lineup." The testimony of Mrs. Smith (Tr. 81-82, Rem. Tr. 21-24, 33-34, 37-38), Linda Smith (Rem. Tr. 57-58), and Detective Holden (Tr. 131-132, 134, Rem. Tr. 131-132, 135) clearly shows that each complainant identified appellant outside the presence of the other and without talking to one another. In partial conflict with the testimony of these three individuals is the testimony of Mr. Feldman, who at the remand hearing testified that, as he remembered, the two complainants entered the lineup room together (Rem. Tr. 75) and talked with each other after they had identified appellant (Rem. Tr. 82-83). Although his notes did not reflect whether they could have overheard each other when they made their identifications (Rem. Tr. 79), he remembered that they were next to one another when they identified appellant.<sup>9</sup> Appellant asks this Court to disbelieve the other witnesses and to give

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<sup>8</sup> See Rem. Tr. 14-16, 21-22, 28, 35-36, 46-47, 52, 56, 66-67, Tr. 77-78, 118-119, 123.

<sup>9</sup> Mr. Feldman could not explain why he failed to object at the time this occurred (Rem. Tr. 85); and in response to the question whether he thought the lineup was suggestive in any way, he replied, "No, I even wrote in my notes I thought it was—quote—this was a fair and just proceeding. The Sex Squad has done a competent job in seeing that the men were given a proper lineup." (Rem. Tr. 87-88.)

credence only to Mr. Feldman's testimony. To do so would necessitate this court's overturning the District Court's express findings of fact upon this issue. Clearly, appellant has not met the "large burden which [he] must shoulder in overcoming the court's finding . . . ." *United States v. Long*, — U.S. App. D.C. —, —, 422 F.2d 712, 715 (1970); see *Clemons v. United States*, 133 U.S. App. D.C. 27, 34, 408 F.2d 1230, 1237 (1968) (*en banc*), *cert. denied*, 394 U.S. 964 (1969). Unless the court's decision "lacks substantial support in the evidence," it must not be disturbed. *United States v. McNeil*, D.C. Cir. No. 22,360, decided October 31, 1969, slip op. at 6.

**III. The trial court's instructions to the jury were proper.**  
(Tr. 141-147, 202-203, 207)

**A. *The giving of the lesser included offense instruction on assault with intent to commit rape was correct.***

In determining whether a lesser included offense instruction should be given a court must ascertain "First, is the relationship between the greater offense and the lesser offense such that a lesser offense charge is proper? Second, does the evidence in the specific case justify giving the lesser offense charge?" *United States v. Comer*, — U.S. App. D.C. —, —, 421 F.2d 1149, 1153 (1970). In the instant case we need not consider the first question, since this Court in *Johnson v. United States*, 122 U.S. App. D.C. 1, 350 F.2d 784 (1965), specifically held that assault with intent to commit rape is a lesser included offense of rape. As to the second consideration, appellant argues that the evidence adduced at trial required the jury to find him either guilty or not guilty of rape as charged. Relying upon this Court's decision in *(Everett) Green v. United States*, 95 U.S. App. D.C. 45, 218 F.2d 856 (1955), appellant contends that there was no evidence which would establish the elements of the lesser offense without also proving the greater, and

consequently, either he was guilty of aiding and abetting in the perpetration of rape or he should have been acquitted. Appellee submits that the court properly gave the lesser included offense instruction.

We initially note that trial counsel made no objection to the instructions being given and advised the court that appellant was satisfied with the charge.<sup>10</sup> Thus, having accepted the instructions at trial, appellant is foreclosed from attacking them on appeal, absent a showing that the alleged defect is plain error affecting appellant's substantial rights. Rules 30 and 52(b), FED. R. CRIM. P.; see *Kelly v. United States*, 124 U.S. App. D.C. 44, 361 F.2d 61 (1966); *Robertson v. United States*, 124 U.S. App. D.C. 309, 364 F.2d 702 (1966); *Rucker v. United States*, 92 U.S. App. D.C. 336, 206 F.2d 464 (1953); *Villaroman v. United States*, 87 U.S. App. D.C. 240, 184 F.2d 261 (1950).

In any event, we cannot subscribe to appellant's belief that the jury could not properly find him guilty of assault with intent to commit rape without also finding him guilty of rape. (*Everett*) *Green v. United States*, *supra*, involved an unusual set of facts. In *Green* (a prosecution for arson and felony murder) the evidence unquestionably showed that appellant had set the fire and that the victim had died of burns and smoke inhalation. This Court held that it was error to instruct on second-degree murder where there was no evidentiary basis for such an instruction. *Green* should have been found guilty of arson and first-degree (felony) murder or acquitted. However, in the instant case there existed a distinct evidentiary predicate upon which it was permissible for the jury to find appellant not guilty of rape but guilty of assault with intent to commit rape. The jury was entitled to believe only parts of the complaining witnesses' testimony and to disregard other parts. *Brough-*

<sup>10</sup> Appellant's trial counsel objected to the *regiving* of the instruction by the court on the ground that repeating the charge would prejudice appellant, but no objection was made on the grounds here raised for the first time (Tr. 202-203, 207).



*man v. United States*, 124 U.S. App. D.C. 54, 361 F.2d 71 (1966); *Young v. United States*, 114 U.S. App. D.C. 42, 309 F.2d 662 (1962).<sup>11</sup> Specifically, the jury was entitled to believe the testimony of Mrs. Smith and Linda Smith that they were sexually molested, while at the same time disbelieving (or failing to find beyond a reasonable doubt) that there had been actual penetration, an element necessary for conviction of rape but not required for conviction of the lesser included offense of assault with intent to commit rape. Such a conclusion was altogether reasonable in light of the medical evidence, which showed no trauma or bruises on the genitalia or anywhere on the body of either complainant. There was no intact sperm found either in the urethral area or inside the vaginal vault of Linda Smith. Examination of her mother revealed the presence of intact sperm in the vaginal vault but none in the urethral area. According to Dr. Tomasci's testimony, this showed that sexual intercourse had occurred sometime within the preceding twenty-four hours, but he could not tell how recent it had been (Tr. 141-147). Since Mrs. Smith was married and living with her husband at the time of the offense, the jury may well have inferred that this had resulted from sexual intercourse with her husband.

Clearly, then, there was a sufficient evidentiary basis upon which the jury was allowed to question whether penetration had occurred and, accordingly, to bring back a verdict of guilty on the lesser included offense. The trial court would have been remiss in its duty if it had failed to give the requested instruction.<sup>12</sup>

<sup>11</sup> In *Young, supra*, this Court reversed a conviction of assault with intent to commit robbery because of the trial court's refusal to give a lesser included offense instruction on simple assault. The court observed: "However implausible, unreliable or incredible only the jury had the right to make the evaluation of [the witness'] testimony." 114 U.S. App. D.C. at 43, 309 F.2d at 663.

<sup>12</sup> Evidence to justify an instruction on a lesser included offense need only be slight. *Stevenson v. United States*, 162 U.S. 313 (1896).

**B. The trial court properly repeated the lesser included offense instruction twice and answered the jury's question regarding the applicability of the aiding and abetting instruction to the lesser included offense.**

Appellant claims that the trial judge erred in repeating the instruction on the lesser included offense of assault with intent to commit rape after being requested to do so by the jury. The law is quite clear, however, that it is solely a matter for the court's discretion whether or not to grant a jury's request for additional instructions. *United States v. Wharton*, D.C. Cir. No. 22,433, decided January 5, 1970; slip op. at 5-6 n.9; see *Allis v. United States*, 155 U.S. 117, 123 (1894); *United States v. Padell*, 262 F.2d 357 (2d Cir. 1958), cert. denied, 359 U.S. 942 (1959); ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, TRIAL BY JURY, Tent. Draft 1968, § 5.2(a). Here the jury twice requested the instruction on the lesser included offense. They were obviously confused, and clarification by the court was necessary. Moreover, the fact that the instruction merely consisted of giving what amounted to a statutory definition of the elements of the crime renders the possibility of any prejudice to appellant remote at best.<sup>13</sup>

Finally, appellant claims that the trial judge erred in simply answering the jury's question in the affirmative that the aiding and abetting instruction was applicable to the lesser included offense as well as to the offense charged (rape). This claim is without merit. The trial court properly responded to the jury's question and helped clear up the apparent confusion which the jury was having. Among the more important functions of a court is to instruct the jury as to what the law is and

<sup>13</sup> The "neutral" content of the instruction given here can be contrasted with the relatively coercive nature of the *Allen* charge, *Allen v. United States*, 164 U.S. 492, 501 (1896), which has nevertheless been repeatedly upheld by the courts. Also, rereading only a portion of the original charge to the jury is proper. (*Abraham*) *Williams v. United States*, 131 U.S. App. D.C. 153, 403 F.2d 176 (1968).

how it applies to the case upon which it is deliberating. By answering the question propounded to it by the jury, the court was only exercising its proper function. This Court has specifically held that it is proper for a trial judge to answer questions posed by the jury after it has begun its deliberations. *Belt v. United States*, 115 U.S. App. D.C. 93, 317 F.2d 157 (1963).

**IV. Appellant was not denied his constitutional right to a speedy trial.**

The right of an accused to a speedy trial is not an absolute right but is "necessarily relative. It is consistent with delays and turns upon circumstances. It secures rights to a defendant. It does not preclude the right of public justice." *Beavers v. Haubert*, 198 U.S. 77, 87 (1905). The courts have consistently held that any determination of whether or not a delay in prosecuting an accused amounts to a denial of his right to a speedy trial depends on the circumstances of each particular case. *Hedgepeth v. United States* [*Hedgepeth I*], 124 U.S. App. D.C. 291, 364 F.2d 684 (1966); (*Raymond*) *Smith v. United States*, 118 U.S. App. D.C. 38, 331 F.2d 784 (1964) (*en banc*).

Briefly the question whether there has been a denial of the right to a speedy trial depends on the circumstances of the case, and requires consideration of the length of delay; reasons for the delay; diligence of prosecutor, court and defense counsel; and reasonable possibility of prejudice from the delay. *Hedgepeth v. United States* [*Hedgepeth II*], 125 U.S. App. D.C. 19, 21, 365 F.2d 952, 954 (1966); *accord*, *Dockery v. United States*, 129 U.S. App. D.C. 243, 244, 393 F.2d 352, 353 (1968).

The purpose of such an analysis is to determine whether there is a showing of "such oppression or of purposeful, vexatious or arbitrary action" as to amount to a deprivation of appellant's constitutional right to a speedy trial. (*Raymond*) *Smith v. United States*, *supra*, 118 U.S. App.

D.C. at 41, 331 F.2d at 787. Appellee submits that no such showing has been made in this case.

A perusal of the procedural history of this case<sup>14</sup> reflects that the delay involved here was occasioned primarily by the various safeguards our system of justice provides for the protection of all individuals accused of crime. For example, appellant was accorded the right to a preliminary hearing to ascertain if there was probable cause to believe that a crime had been committed and that appellant had in fact committed it. This occurred on September 19, 1967, one week after his arrest. Thereafter appellant's case was presented to a grand jury for determination by that body, comprised of the citizens of this community, whether or not the evidence warranted his standing trial for the offense. The entire grand jury procedure took approximately two months, resulting in an indictment being returned on November 15, 1967.<sup>15</sup>

Appellant was arraigned in District Court on December 1, 1967, and on December 6 Mr. DeLong Harris was appointed trial counsel. A period of ten months elapsed from arraignment to the first scheduled trial date. During this time various pretrial motions were made by appellant and his co-defendant Brown, including a motion for a mental examination of Brown, which was granted.<sup>16</sup> On June 3, 1968, Mr. Harris withdrew as counsel for appellant, and the court appointed Samuel L'Hommiedieu, Jr., in his place. The case was finally set for trial on September 9, 1968.

<sup>14</sup> See pp. 3-4, *supra*.

<sup>15</sup> This lapse of time in itself is in no manner objectionable. *Hood v. United States*, 125 U.S. App. D.C. 16, 365 F.2d 949 (1966).

<sup>16</sup> Appellant's case was properly tied to Brown's at the outset, and the desire of the Government to try them as co-defendants is likewise reasonable in light of the present strain upon prosecutorial and judicial resources in this jurisdiction. *Wilkins v. United States*, 129 U.S. App. D.C. 397, 398, 395 F.2d 620, 621 (1968); (*George*) *Smith v. United States*, — U.S. App. D.C. —, 418 F.2d 1120, 1122 (1969); Rule 8(b), FED. R. CRIM. P.

At this point, nearly twelve months had elapsed since appellant's arrest. The prosecution was no more responsible for the delay than the defense, and neither was responsible for most of it. Rather, as we have attempted to point out, the delay was occasioned by the procedural safeguards of our judicial system, and as this Court has stated:

Where a principal cause of postponement is the deliberate pace of the system of safeguards designed to protect the accused, the courts have been exceedingly reluctant to find constitutional infirmity even in very long delays. *Blunt v. United States*, 131 U.S. App. D.C. 306, 310, 404 F.2d 1283, 1287 (1968), *cert. denied*, 394 U.S. 909 (1969).

The remaining delay of four months prior to the actual commencement of appellant's trial resulted from five different continuances. Two of these were requested by appellant, and two others were chargeable to the Government. Of the latter, one was granted with the express concurrence of appellant, and the other was necessitated by illness of both a complaining witness and the Government's trial counsel. The fifth continuance was ordered by the court. Thus, contrary to appellant's contentions, hardly any of the delay complained of was attributable solely or even principally to the Government.

Appellant, however, relies on the length of the delay in itself to show prejudice. Such reliance is ill founded, for both the Supreme Court and this Court have held that the mere length of a delay will not in and of itself establish a denial of the right to a speedy trial.<sup>17</sup> See, e.g., *United States v. Ewell*, 383 U.S. 116 (1966) (nineteen-month delay between indictment and trial); *Bynum v. United States*, 133 U.S. App. D.C. 4, 408 F.2d 1207 (1968), *cert. denied*, 394 U.S. 935 (1969) (eighteen-month delay from arrest to trial); *Hedgepeth II*, *supra* (fourteen-month delay between indictment and

<sup>17</sup> Unless, of course, that delay is truly exceptional. E.g., *Petition of Provo*, 17 F.R.D. 183 (D. Md.), *aff'd*, 350 U.S. 857 (1955).

trial). Moreover, it must be clearly established that appellant has specifically been prejudiced by the delay. *United States v. Ewell*, *supra*, 383 U.S. at 122. Clearly, the record is devoid of any indication of prejudice,<sup>18</sup> and appellant has been unable to demonstrate "the likelihood, or at least the reasonable possibility that [he] has been prejudiced by the delay." *Hedgepeth I*, *supra*, 124 U.S. App. D.C. at 294, 364 F.2d at 687.

Finally, in addition to appellant's inability to show actual or possible prejudice to his defense, he has in no way shown that the delay was "arbitrary, purposeful, oppressive, or vexatious," (*Raymond*) *Smith v. United States*, *supra*, 118 U.S. App. D.C. at 41, 331 F.2d at 787, or the result of "negligence or callous indifference to the requirements of speedy trial . . . ." *Hedgepeth I*, *supra*, 124 U.S. App. D.C. at 295, 364 F.2d at 688. Appellant has shown a delay, perhaps overly long in retrospect, but not of sufficient length to constitute an automatic denial of his Sixth Amendment right. Having failed to establish that the delay was prejudicial to him, appellant cannot claim that he was denied a speedy trial.

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<sup>18</sup> Appellant alleges "some prejudice" in that the trial delay caused the unavailability of Mr. Feldman to testify (Appellant's Brief at p. 78). This claim is completely without merit. Appellant's counsel at trial made no request that the trial be held in abeyance until Mr. Feldman appeared to testify, nor did he attempt to subpoena or contact Mr. Feldman before trial. The Government cannot be held accountable for inadequate preparation by appellant's trial counsel. Further, we fail to see how this witness' unavailability was effected by the delay complained of here. Although the witness had moved to New York (the record does not reflect when), his accessibility was readily demonstrated by his appearance in response to subpoena at the remand hearing.



V. The revocation of appellant's probation in Criminal Case No. 298-66 was proper.

(Prob. Tr. 1-5)

A. Appellant had effective assistance of counsel at the probation revocation hearing.

Appellant asserts that he was without counsel at the revocation of probation hearing because his assigned trial counsel in case No. 298-66 was not present. Although appellant was represented at the hearing by other counsel assigned to represent him in case No. 1440-67 (in which appellant was being sentenced at the same time), he still contends that the court erred in revoking his probation in the absence of "specially assigned" counsel. We find this contention to be unpersuasive.

Appellant was represented at the proceedings by Mr. L'Hommedieu, his trial counsel in case No. 1440-67. Although Mr. L'Hommedieu did not represent appellant when he entered his guilty plea and was placed on probation in case No. 298-66, he was well acquainted with his client's background and in fact informed the court that he knew appellant was on probation at the time he perpetrated the crimes of which he was found guilty in case No. 1440-67 (Prob. Tr. 2). Clearly he was able to provide effective assistance of counsel for appellant as required by the Supreme Court in *Mempa v. Rhay*, 389 U.S. 128 (1967). Although Mr. L'Hommedieu might technically be described as "substitute counsel," the logical and reasonable inference to be derived from this Court's decision in *United States v. Kirby, supra*, clearly would permit the use of substitute counsel at revocation of probation hearings. Moreover, in *Mempa v. Rhay, supra*, 389 U.S. at 137, the Supreme Court held:

All we decide here is that a lawyer must be afforded at this proceeding whether it be labeled a revocation of probation or a deferred sentencing. We assume that counsel appointed for the purpose of the trial or guilty plea would not be unduly burdened by

being requested to follow through at the deferred sentencing stage of the proceeding. [Emphasis added.]

Clearly, the language employed by the Court reflects the right to have "a lawyer" at the proceedings, preferably the trial counsel, although his presence is not mandatory. The Court obviously recognized the necessity for having substitute counsel where it is either impractical or impossible to have the trial counsel present. This is especially true where the revocation hearing occurs after a significant period of time has elapsed. To require otherwise might allow a probation violator effectively to thwart justice by claiming he did not have his trial counsel present, even though such counsel may have died, been ill, retired, or moved from the jurisdiction. Surely, the Governmental interest which would permit the use of substitute counsel is justified. Appellee submits that the presence of Mr. L'Hommedieu sufficiently fulfilled the requirement of counsel established by *Mempa v. Rhay*.

***B. The court did not abuse its discretion in revoking appellant's probation.***

The only question to be determined when reviewing a court's ruling in a revocation of probation hearing is whether there has been an abuse of discretion. *Burns v. United States*, 287 U.S. 216, 222 (1932); *Hurt v. United States*, 126 U.S. App. D.C. 69, 70, 374 F.2d 283, 284 (1966). The court's ruling must be the product of "conscientious judgment, not arbitrary action." *Burns v. United States*, *supra*, 287 U.S. at 223. When these principles are applied to the instant case, it is apparent that the trial court acted conscientiously and reasonably in revoking appellant's probation. Having been convicted before the same court of two counts of assault with intent to commit rape and two counts of assault with a dangerous weapon, there was a notorious and flagrant violation of the conditions of appellant's probation. Be-

ing confronted with these facts, the court was amply justified in ordering revocation.<sup>19</sup>

### CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court in both cases should be affirmed on the merits.<sup>20</sup>

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<sup>19</sup> We agree with appellant on one point to a limited extent. If this Court reverses appellant's conviction in No. 22,875, then we think that it would be in order to vacate—not reverse—the revocation of probation in No. 22,910 and to remand the latter case to the District Court for reconsideration in light of such reversal. Nevertheless, we strongly maintain that there was no reversible error committed by the District Court in either case.

<sup>20</sup> In light of this Court's recent opinion in *United States v. Straite*, D.C. Cir. No. 23,260, decided April 2, 1970, we would not oppose a vacating of the general sentence imposed in No. 22,875 and a remand for resentencing on each count separately. We would point out, however, that the *Straite* case was decided long after the entry of judgment in the case at bar, so that the District Court did not have the benefit of this Court's views on the subject of general sentences.